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No. 2000-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

MICHELLE GRANDIS BAZZETTA,

Petitioner-Appellee,

v.

JOAN YUKINS, Warden,

Respondent-Appellant.

On Petition For A Writ of Certiorari To the Court Of Appeals For the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

I. **Is The Standard of Review for Determining Ineffective Assistance of Counsel Claims Under the AEDPA in Conflict with this Court's Settled Jurisprudence?**

II. **Did the Misconception That Expert Evidence of Battered Woman Syndrome Is Only Admissible in Cases Involving Self-defense Effectively Deny Petitioner the Opportunity to Present Expert Evidence Essential to Her Defense in Violation of Her Constitutional Rights?**

III. **Were the Denials of Petitioner's Claim of Ineffective Assistance of Counsel in Conflict with this Court's Settled Jurisprudence and an Unreasonable Application of *Strickland*?**

IV. **Were the Denials of Petitioner's Claim of Insufficient Evidence to Convict for Second Degree Murder Under an Aiding and Abetting Theory in Conflict with this Court's Settled Jurisprudence, an Unreasonable Application of *Jackson v. Virginia* and an Unreasonable Determination in Light of the Evidence Presented?**

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1999

No. 2000-_____

MICHELLE GRANDIS BAZZETTA,

Petitioner-Appellee,

v.

JOAN YUKINS, Warden,

Respondent-Appellant.

On Petition For A Writ of Certiorari To the Court Of Appeals For the Sixth Circuit

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Michelle Bazzetta ("Bazzetta" or "Petitioner"), a Michigan inmate, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, which erroneously affirmed the District Court's denial of her petition for a writ of habeas corpus.

Opinions Below

The opinion of the Court of Appeals for the Sixth Circuit appears at Appendix A to the Petition and is unpublished. The opinion of the United States District Court for the Eastern District of Michigan, Southern Division, appears at Appendix B to the Petition and is unpublished. The order of the United States District Court for the Eastern District of Michigan, Southern Division, denying reconsideration appears at Appendix C to the Petition and is unpublished. The opinion of the Michigan Supreme Court denying leave to appeal in a standard order is reported at *People v. Michelle Grandis Bazzetta,* 450 Mich. 854, 538 N.W.2d 680 (1995), and appears at Appendix D of the

Petition. The opinion of the Michigan Court of Appeals is styled *People v. Michelle Grandis Bazzetta*, No. 123769 (1994), appears at Appendix E to the Petition and is unpublished. The opinion of the trial court is styled *People v. Michelle Grandis Bazzetta*, Oakland County Circuit Court No. 88-086394 (1992), appears at Appendix F to the Petition and is unpublished.

Jurisdiction

The opinion of the United States Court of Appeals for the Sixth Circuit denying the writ of habeas corpus was issued on December 2, 1999. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), Petitioner having asserted below and herein a deprivation of her rights under the United States Constitution.

Constitutional and Statutory Provisions Involved

This case involves the Sixth Amendment to the United States Constitution, which provides in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for [her] defense.

This case also involves the Fourteenth Amendment to the United States Constitution, which applies the Sixth Amendment to the states, and which provides, in pertinent part:

> No . . . State [may] deprive any person of . . . liberty . . . without due process of law.

This case also involves the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), which provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted with respect to any claim that was adjudicated on the merits in the State court proceeding unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the

Supreme Court of the United States, or

(2) resulted in a decision that was based on an unreasonable determination in light of the evidence presented in the State court proceeding.

Statement of The Case

C. The Trial and Sentence

On October 11, 1989, Petitioner was convicted by a jury of 2nd degree murder, and she was sentenced to life in prison on November 21, 1989. The prosecutor's theory at the trial was that Petitioner had aided and abetted Joe Bazzetta in his 1st degree murder of his stepmother. (J.A. 491).[1] Defense counsel argued that there was no evidence Petitioner aided and abetted or participated in the murder and that Petitioner was only guilty of being an accessory after the fact, because she admitted that she helped dispose of the body. (J.A. 117-129; 329-330; 354-355). The evidence to support Petitioner's conviction of 2nd degree murder under an aiding and abetting theory was not overwhelming; it was circumstantial, at best, and failed to prove each and every essential element of the charged crime beyond a reasonable doubt.

During the trial, the prosecution relied on the myths of Battered Woman's Syndrome and Petitioner's actions as inculpatory evidence.[2] He

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[1] J.A. refers to the Joint Appendix, which was filed with the appeal in the United States Court of Appeals for the Sixth Circuit.

[2] The syndrome has also been referred to as the battered women, battered wife, battered spouse or battered person syndrome. Its application is not limited, however, to a particular gender, nor is it limited by marital status. *See generally,* anno.: *Battered-Women Syndrome*, 58 ALR 5th 749; *see also,* Lenore E. Walker, *The Battered Woman* (1979). Although it will hereinafter be referred to as "BWS", many domestic violence experts now agree that the term "battered woman syndrome" is too limiting as it does not properly convey the range of behavioral and psychological responses that battered women exhibit, instead it incorrectly implies that all women who experience abuse react in exactly the same way. *See,* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1196 (1993); and *People v. Humphrey*, 921 P.2d 1, 7 n.3 (Cal. 1996). The phrase "battering and its effects" has also been used to describe the experiences, beliefs, perceptions, and realities of battered women's lives. *See, e.g.*, National Institute of Justice, Department of Justice, *The Validity and Use of Evidence, Concerning Battering and its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act*, No. 160972 (May 1996) (hereinafter referred to as NIJ); Dutton (Hofstra 1993); and Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome*

emphasized Petitioner's failure to report the crime, particularly during two periods of brief separation between Petitioner and the murderer. He seized upon the myths associated with BWS and used Petitioner's reaction to the abuse suffered by her at the hands of her abuser, the murderer, as evidence of her guilt. (J.A. 492). The prosecution's recurring theme was that Petitioner loved Joe Bazzetta, that she did not leave him, and that, because she did not leave him, she was a participant in the crime committed by Joe Bazzetta. (J.A. 492). This theme could have been rebutted by expert testimony on BWS, which was not presented by Petitioner's trial counsel. As such, she was not afforded effective assistance of counsel.

At trial, Petitioner testified that on the date of the murder she was sleeping in the basement of the Bazzetta home. She heard loud yelling and a thud, and she went upstairs, where she found Joe strangling Helen Bazzetta. (J.A. 116-11117). She did not try to stop Joe when he killed his stepmother, because she was very scared. (J.A. 128-129). She could not scream immediately, but when she did, Joe Bazzetta body slammed her and said "[s]hut the fuck up or your next." She continued to cry and he continued to slap her, push her and tell her to shut up. (J.A. 119-120). Joe wrapped the body in plastic and a quilt. (J.A. 120-121). He threw some rags at her and told her to clean up the blood on the kitchen cupboards. She helped clean up the kitchen, not because she loved him, but because "I had just seen someone I loved very much strangle somebody." She cleaned up the kitchen, as ordered, before driving Helen's car to Oakland Mall, as Joe directed her. (J.A. 120-121; 123-124). She also testified that the reason she did not immediately contact police was because she was "terrified of Joe and just terrified, period." (J.A. 125).

Petitioner testified that she did not encourage Joe to kill Helen and that she did not plan or assist in the murder committed by Joe. (J.A. 122; 152-153). She did not plan where to bury the body prior to the crime. (J.A. 124; 147-149; 157; 189). Only after Joe had murdered Helen did she help Joe find a place to bury the body, which was near her childhood home in Milford, Michigan. (J.A. 127; 161). She did not touch the body and she only placed rocks on the grave to cover it, which was placed in the grave by Joe. (J.A. 128; 164-165).

Petitioner testified that she tried to leave Joe a number of times after he murdered Helen, but that she was never successful. "[He] always told me that I was just as guilty as he was . . . and he always told me that if you try and say anything I'll take you down with me. You'll be just as guilty as I am, things like that." (J.A. 130; 134). The first two years after Joe committed the

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to Coercive Control, 58 Alb. L. Rev. 973, 975-76 (1995).

murder were very violent. (J.A. 133). Petitioner went to the hospital on numerous occasions due to Joe's beatings, but she did not use her real name or reveal that Joe was her assailant because she was scared. (J.A. 132).

The testimony of other witnesses was offered to show that Petitioner was afraid of Joe and had been beaten by him, but it was not sufficient without expert testimony to explain the characteristics associated with BWS. A disinterested bystander testified that three weeks after the crime, Petitioner was beaten by Joe on the street.[3] (J.A. 94-97). Pat Goodwin, a witness for the prosecution, testified that she had seen Petitioner severely beaten up three months after Helen's disappearance. (J.A. 308-309). She stated Petitioner cradled a stuffed animal for comfort. (J.A. 310). Goodwin always felt Joe was responsible for the bruises. (J.A. 315). On one occasion, Petitioner stated to Goodwin that "Joey's father was better off without [Helen]", but Goodwin also indicated that Petitioner made the statement "like she was trying to get approval from Joey", who was present at the time. (J.A. 315).

John Bazzetta, Joe's father, testified that he took Petitioner to the emergency room for treatment following a beating by Joe. (J.A. 81-82). Another witness corroborated Petitioner's testimony that she had been run over by Joe with his car. (J.A. 130-133). Petitioner's mother testified that Petitioner came into the house with cuts and bruises, and that she was taken to the hospital that day. Although Petitioner's trial counsel attempted to utilize this evidence to prove that she was afraid of Joe, (J.A. 358-359), it was minimized by the prosecution, who emphasized that Petitioner could have left Joe on at least two occasions and reported the crime without fear of reprisal by Joe. This continuous theme by the prosecution of "if she was battered, then she could have left at any time" was a perpetuation of the myths of BWS, and, without expert testimony to explain those myths to the jury, supported prosecution's theory.

The only "direct" evidence offered by the prosecution to support the theory Petitioner aided and abetted Joe Bazzetta's 1st degree murder of Helen Bazzetta was the testimony of Detective Hummel. He testified that he was present during an interview with Petitioner and her trial counsel, but that he was only taking notes and not asking her questions. (J.A. 320; 328-329). He also admitted that the five hour interrogation was not transcribed or recorded, that Petitioner repeatedly maintained she did not plan or assist Joe in his murder of Helen and that she was never allowed to read over the notes to see

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[3] Robin Mingo was not allowed to testify that she heard Petitioner scream "Help me. Help me. That's Helen Bazzetta's stepson. He killed her. Now he's trying to kill me." The trial court ruled that the statement did not meet the requirements of an excited utterance. (J.A. 87-93). Although Ms. Mingo reported the incident to police, it was never investigated.

if they were an accurate reflection of her statement. (J.A. 345-347). Petitioner stated that Joe had talked about killing Helen on many occasions, but that she interpreted it as a euphemism and never took him seriously. (J.A. 149-150). She was consistent in her statement that there was no discussion between Joe and her about how to dispose of the body before the killing, only after. (J.A. 139-140; 203-204). On one occasion, Detective Hummel believed or understood her to say that the discussion concerning burial took place prior to the murder. He admitted, however, that Petitioner later clarified that she meant the discussion took place after Joe murdered Helen. (J.A. 139-140; 345-348).[4]

The remaining evidence adduced at trial by the prosecution to support their theory of aiding and abetting was circumstantial: that the body was found near where Petitioner lived as a child, that Petitioner disliked Helen, that Petitioner was Joe's girlfriend during the time he murdered Helen and stayed with him afterwards, that the body was found with handcuffs, and that she tried to fabricate an alibi. *See,* Appendix. B. There was no evidence that the handcuffs found on the body belonged to Petitioner. (J.A. 113). There was no evidence that Petitioner wanted to kill Helen, but there was evidence that Joe wanted to kill Helen. (J.A. 83-84; 114-115; 413-414; 417-418). Although Petitioner admitted that she tried to fabricate an alibi, she testified that she did so because she did not want to be associated with the crime. (J.A. 133).

During deliberations, the jury requested that the testimony of Petitioner and Detective Hummel be re-read. (J.A. 269-288). Despite the insufficient evidence that Petitioner aided and abetted in Joe Bazzetta's premeditated murder of Helen Bazzetta, the jury returned a verdict of 2nd degree murder - a verdict not supported by the evidence or prosecution's theory. At sentencing, the trial judge indicated that he did not understand Petitioner's actions and sentenced her to life imprisonment. (J.A. 289-290).

D. The *Ginther* Hearing

After her conviction, Petitioner filed a Motion for New Trail, based on ineffective assistance of counsel. On remand, a *Ginther* [5] hearing was

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[4] Petitioner's trial counsel maintained that Petitioner never indicated during the interrogation that she discussed with Joe where to bury the body before the murder, but he was not allowed to testify. (J.A. 349-53; 210-16). During the interviews with the detectives, she stopped to confer with her attorney, because he had instructed her to do so if she remembered things she had not told him. (J.A. 140-141).

[5] *People v Ginther*, 390 Mich. 436; 212 N.W.2d 922 (1973). Testimony related to this hearing for post-conviction relief is contained in the Joint Appendix at 217-268; 289-290; 363-406; 419-468; 476-482.

conducted before the trial judge, so Petitioner could present evidence that her trail counsel was ineffective for failing to present evidence of BWS. Petitioner contends that had such evidence been presented, she would have had a strong probability of acquittal given the weakness of the prosecution's case against her, and that expert testimony regarding BWS was necessary to explain her actions of staying with her abuser following his murder of his stepmother.

During the hearing, Petitioner's court appointed trial counsel, Larry Kaluzny, testified he knew that it was important to explain why Petitioner stayed with her abuser for all those years, and that he needed to find an expert who might help with that explanation. (J.A. 375; 382). He also testified that he did not have any experience with BWS and that his research about BWS was limited to an ELR [sic] cite and a magazine article on BWS.[6] (J.A. 376-377; 396-398) His "investigation" into obtaining an expert began in March of 1989, and was limited to speaking to a counselor at the battered women's shelter, who referred him to a doctor. Even though it was important to Petitioner's defense and important to Petitioner, his efforts at obtaining an expert in the months before trial were tantamount to telephone tag.[7] When he was unable to reach the doctor, Kaluzny did not pursue the matter any further,[8] and he proceeded to trial without an expert. (J.A. 373-375; 378-379; 381-383; 389). Kaluzny testified that he did not gain any advantage by not having an expert and that he should have used one. (J.A. 395).

Petitioner testified that, beginning in March of 1989, she was consistent about wanting an expert witness. A couple of weeks before trial began in late September of 1989, Kaluzny told her that he had not been able to locate an expert witnesses, and that they would have to adjourn the trial, in order to locate one. Petitioner wanted to seek an adjournment, but acquiesced

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[6] If Kaluzny had conducted even adequate legal research and investigation regarding BWS, then he would have easily determined that BWS was beyond the ken of the average juror, and that an expert in BWS was necessary because it was relevant to the question why Petitioner did not leave the relationship and to explain the paradoxical actions of his client. *See, e.g., Minnesota v. Hennum*, 441 N.W.2d 793 (June 16, 1989)(en banc).

[7] *Cf., People v. Romero*, 13 Cal. Rptr.2d 332 (Cal. App. 2 Dist. 1992), *rev'd on other grounds*, 35 Cal. Rptr.2d 270, 883 P.2d 388 (1994)(defendant's trial counsel found ineffective where he was not familiar with BWS, obtained the phone number of an expert on BWS from a counselor at the battered woman's shelter, but never followed up on it before trial).

[8] Although Kaluzny contended that he was able to reach the doctor, Dr. Lew Okun testified that he was never contacted by Kaluzny. (J. A. 476-7). Dr. Okun was the only doctor referred to Kaluzny by the counselor at the battered women's shelter. A few days before trial, Petitioner became concerned about the lack of an expert, and her mother contacted Dr. Okun, who indicated he had not been contacted by anyone about the case. (J.A. 224-225; 228).

to Kaluzny's uninformed judgment that an expert on BWS was unnecessary. (J.A. 229-231). There was no waiver placed on the record that Petitioner wanted to go to trial without an expert. [9]

Amy Coha, an expert in the field of BWS, testified that it is not unusual for women to remain with men who abuse them, and they do it because of their perception of the causative factors for the violence. According to Coha, the reasons Petitioner stayed were related to witnessing Joe kill his stepmother, which coupled with the threat she would be next, was "absolutely paralyzing." (J.A. 245-246). Ms. Coha testified that if one witnesses an intimate partner commit such a violent act, then are threatened with death by that person, the threat is greater than if two non-intimate individuals are present at such a scene. This is because in an intimate situation, one partner knows everything about the other - who her family is, where her friends are, where safety will most probably be sought - making the intensity and degree of such a threat much greater. In this case, the threat of tracking and stalking to Petitioner would be intensified. Not only would Joe potentially want to stalk her after her exit, which is classic in a battering relationship, but he would have had an additional motive, *i.e.*, her potential incrimination of his murder of Helen Bazzetta. (J.A. 251-254).

Dr. Steven Miller, a licensed psychologist and certified forensic examiner, testified that BWS is characterized by a pathological bonding or traumatic bonding. It is often also characterized by paradoxical behavior of the individuals involved, *e.g.*, abused partners who do not leave abusive partners. (J.A. 419-420). Dr. Miller interviewed Petitioner. The shock of Petitioner witnessing Joe strangling Helen created a "frozen fright", which he described as a psychological shock followed by a traumatic depression. "[T]he person feels helpless in that situation, confused, they don't know what to do, they don't know how to behave, and they feel very, very frightened for their own life, particularly in that situation because she was threatened." (J.A. 423-426).

According to Dr. Miller, Petitioner became paralyzed by the sight and he likened her situation to that of a hostage, which is a typical reaction of women experiencing BWS. Petitioner's actions after burying the body, including having a drink with Joe and spending the night at a motel with him, were also consistent with hostage behavior, especially the need to identify with the aggressor. (J.A. 425-428). He determined that Petitioner was experiencing BWS in the years after the killing, and that ***there were elements of the syndrome present in the relationship prior to the crime***. (J.A. 462-463). Dr. Miller, who had extensive experience testifying in front of juries and speaking

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[9] *See, e.g., United States v. Rico,* 51 F.3d 495 (5th Cir. 1995) (defendant could not claim conflict-free ineffective assistance of counsel after signing a waiver document).

with them about their verdicts, expressed his opinion regarding the necessity to explain BWS to the jury as follows:

> THE COURT: [W]hat effect [might expert testimony on BWS] have on a jury?
>
> DR. MILLER: I think it might have helped the jury understand her better, maybe make some identification with her.
>
> THE COURT: What if there had already been [non-expert] testimony in connection with the fact that she had been abused, that there had been threats upon her life, that he had beaten her up, etcetera, etcetera? Well, the information is already there, you think they need a greater psychological input then?
>
> DR. MILLER: Yes, sir, because I believe that, my experience with juries is that they operate on common sense. **And this paradoxical behavior [of Petitioner], therefore, requires, I think, an expert to explain why the person behaves in such a paradoxical manner.** [Emphasis added; bracketed information added].

(J.A. 419-420; 468). [10]

Marjory Cohen, President of the Michigan Trial Lawyers Association, also testified on behalf of Petitioner. She had handled a significant number of cases, including capital criminal cases, involving defendants who were battered women. She had conducted seminars on representation of battered women, and had prepared training materials for attorneys who want to develop better skills in this area. (J.A. 255-259). She testified she used BWS expert witnesses to prepare for trial. Based on her review of the trail transcript, she determined that an attorney of ordinary skill and training in criminal law would have investigated the BWS issues present in this case. An attorney should

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[10] In its opinion following the *Ginther* hearing, the trial court indicated it would follow the law regarding expert testimony on BWS established in *People v. Geraldine Wilson*, 487 N.W.2d 822 (Mich. App. 1992) (expert testimony regarding BWS will give the trier of fact a "better understanding of the evidence or assist in determining a fact in issue."). Had the court followed *Wilson*, then Petitioner should have been granted a new trial.

have known to investigate BWS, even in light of the fact that this case does not involve a strict self-defense situation, *i.e.*, a defendant who kills someone who is assaulting her. (J.A. 260). Ms. Cohen concluded that trial counsel was ineffective in his representation of Petitioner. (J.A. 261-262).

Despite the foregoing and other evidence, the trial court denied Petitioner's Motion for New Trial and erroneously held that her trial counsel was effective. His opinion, however, further perpetuated the myths of BWS at issue, because he believed that the average person sitting on a jury could comprehend the concept and echoed his statement at Petitioner's sentencing that he did not understand her actions. He felt that expert testimony regarding BWS would have only been a redundancy and was easily understood by the average layperson. Conversely, this is exactly the reason expert evidence of BWS was necessary and has been deemed admissible: *viz.*, because it is beyond the understanding of the average person, and that an expert in BWS was necessary because it was relevant to the question why a defendant did not leave the relationship and to explain the paradoxical actions of the defendant. *See, e.g., Minnesota v. Hennum*, 441 N.W.2d 793 (1989)(en banc); *see also, People v. Geraldine Wilson*, 487 N.W.2d 822 (Mich. App. 1992)(expert testimony regarding BWS will give the trier of fact a "better understanding of the evidence or assist in determining a fact in issue.").

E. Subsequent Appeals

Following the *Ginther* hearing, the Michigan Court of Appeals affirmed Petitioner's conviction, denied she had received ineffective assistance of counsel and found the evidence was sufficient to convict her. Petitioner filed for leave to appeal to the Michigan Supreme Court, but was denied leave on August 25, 1995. Justice Levin dissented and would have remanded this case to the Court of Appeals for reconsideration in light of *People v. Christel*, 449 Mich. 578 (1995)(expert testimony regarding the "generalities or characteristics" of BWS may be admitted for the limited purpose of describing "the uniqueness of a specific behavior brought out at trial"). The United States District Court denied Petitioner's petition for habeas corpus without performing *de novo* review required by the AEDPA. The district court's opinion was in contravention of clearly established federal law, as determined by the Supreme Court of the United States and was an unreasonable determination in light of the evidence presented in the State court proceedings. The Sixth Circuit Court of Appeals agreed with the district court reasoning. The only means of correction lies with this Court, and Petitioner's request for a writ of certiorari should be, in all things, granted.

Reasons For Granting The Petition

I. The Standard of Review for Determining Ineffective Assistance of Counsel Claims Under the AEDPA is in Conflict with this Court's Settled Jurisprudence.

Over the years, this Court has taken pains to develop the appropriate burdens of proof for habeas petitioners, the degrees of which are keyed to the constitutional rights asserted. "A petitioner need not point a habeas court to a factually identical precedent," because "[o]ftentimes Supreme Court holdings are 'general' in that they erect a framework specifically intended for application to various factual situations." *O'Brien v. Dubois*, 145 F.3d 16 (1st Cir. 1998).[11] As several courts have recognized, the text of the AEDPA, which governs Petitioner's habeas request, offers little guidance to the courts charged with applying it. *See, Lindh v. Murphy*, 521 U.S. 320, 336 (1997)("[I]n a world of silk purses and pigs' ears, [AEDPA] is not a silk purse in the art of statutory drafting."); *O'Brien*, 145 F.3d at 20 (noting that the AEDPA is "hardly a model of clarity . . . and its standard of review provision is far from self-explicating").

Under 28 U.S.C. § 2254(d), a court may not grant habeas relief unless: (1) the state adjudication resulted in a decision that was "contrary to" or an "unreasonable application of" clearly established federal law, as determined by the Supreme Court, *see, id.* § 2254(d)(1); the state adjudication resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence." *Id.* § 2254(d)(2). The federal courts are to presume the factual findings of the state court are correct, unless the petitioner shows otherwise by clear and convincing evidence. *See, Id.* § 2254(e)(1). The federal courts of appeals have adopted differing interpretations of the standards of deference due state court findings of fact under § 2254(d)(1).[12] Despite these varied interpretations in the circuit courts, Petitioner contends her habeas would have been granted had the proper standard been used. Rather, Petitioner

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[11] Citing in footnote, *Waller v. Georgia*, 467 U.S. 39 (1984)("violation of the right to public trial" test); *Strickland v. Washington*, 466 U.S. 668 (1984)("ineffective assistance of counsel" test); and *Jackson v. Virginia*, 443 U.S. 307 (1979)("insufficiency of the evidence" test).

[12] *See, e.g., Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 885-887 (3rd Cir. 1999)(citing cases); *Nevers v. Killinger*, 169 F.3d 352, 357-62 (6th Cir. 1999)(citing cases), *cert. denied*, 119 S.Ct. 2335 (1999); *O'Brien v. Dubois*, 145 F.3d 16, 21-25 (1st Cir. 1998); *Green v. French*, 143 F.3d 865, 870-73 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 844 (1999). The Supreme Court has granted certiorari to settle the differences in interpretation. *See, Williams v. Taylor*, 119 S. Ct. 1355 (1999).

asserts that the deferential standard utilized in reviewing her ineffective assistance of counsel claim was incorrect. Apparently, the district court believed that an ineffective assistance of counsel claim was subjected to the same standard of review utilized to evaluate claims involving law-based determinations of the state courts. [13] This is not the proper standard of review.[14]

Although federal courts must defer to state court factual findings, according them a presumption of correctness that the petitioner may rebut only with clear and convincing evidence, this presumption only applies to underlying basic, primary, or historical facts, and not to mixed questions of facts and law, which receive *de novo* review. *Rickman v. Bell*, 131 F.3d 1150, 1153 (6th Cir.1997), *cert. denied*, 118 S.Ct. 1827 (1998); *West v. Seabold*, 73 F.3d 81, 84 (6th Cir.), *cert. denied*, 518 U.S. 1027 (1996). A State court's conclusion that counsel rendered effective assistance of counsel is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(e)(1). Ineffectiveness is a mixed question of law and fact, not a question of basic, primary, or historical fact. The performance and prejudice components of the ineffectiveness inquiry, which are mixed questions of law and fact, are not entitled to the deference requirement of 28 U.S.C. § 2254(e). *Strickland*, at 698.

Petitioner insists she was entitled to *de novo* review by each of the federal courts of the State court's erroneous determination that counsel was effective. In turn, she was also entitled to *de novo* review by the circuit court of the district court's determination. *See, Miller v. Champion*, 161 F.3d 1249, 1252, 1254 (10th Cir. 1998)(applying AEDPA). Neither the district court nor the circuit court engaged in an analysis of whether or not Petitioner's trial attorney's actions were reasonable. Instead of engaging in a *de novo* review of counsel's actions and omissions to determine if they were reasonable under *Strickland*, the district court wholly adopted the conclusions of the Michigan Court of Appeals and the trial court, which, pursuant to the AEDPA, were

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[13] "Under subsection (d)(1), a petitioner will be entitled to relief only if the state court's decision of a purely legal issue was contrary to clearly established law as decided by the Supreme court, or if the court's application of that law to the facts was unreasonable." *See,* Appendix B - United States District Court's Opinion, p. 8a.

[14] In determining what standard of review to use on Petitioner's claim of insufficient evidence to convict of 2nd degree murder, the district court opined that 28 U.S.C. § 2254(d) makes no exception for cases raising issues of insufficient evidence and decided that the standard utilized by the Michigan Court of Appeals for reviewing sufficiency of evidence claims was derived from *Jackson v Virginia*, 443 US 307 (1979). Petitioner believes that both 28 U.S.C. § 2254(d)(1) and (2) apply to insufficient evidence claims.

contrary to and/or an unreasonable application of *Strickland*. The conclusions of the district court were then adopted by the circuit court in a memorandum opinion.

Under the deferential scope of review provided by the federal courts, Petitioner did not receive a fully reasoned decision on the merits to which she is entitled. "Adjudication" focuses on the quality of "the act or process of adjudicating" or "the legal process of resolving a dispute." *Webster's Third New International Dictionary, Unabridged* 27 (1986); *Black's Law Dictionary* 42 (6th ed. 1990). Consistently throughout the courts' application of doctrines limiting consideration of claims previously resolved by another body, the "adjudication" prerequisite has been understood to require that the adjudicative process be "full", "fair", "adequate", "meaningful" and routinely and easily "available" to litigants. *See, e.g., Ford v. Wainwright*, 477 US 399, 418 (1986)(Powell, J., concurring). Petitioner has repeatedly explained to the courts that the question is not whether trial counsel's actions could be characterized as strategy, but whether they can be viewed as ***reasonable***. They cannot be viewed as reasonable under this Court's settled jurisprudence. To date, the courts, both state and federal, have summarized evidence brought out at the *Ginther* hearing and have summarized the law on ineffective assistance of counsel. What the federal courts have not done is conduct *de novo* review of counsel's actions to decide whether trail counsel's performance was deficient and whether it was prejudicial to Petitioner. Clearly, trial counsel's performance was deficient and it was prejudicial.

The standard of review currently utilized in the Sixth Circuit for reviewing claims of ineffective assistance of counsel, and the deference afforded to the state court determinations of those claims, would prevent a writ of habeas corpus from being issued to any petitioner claiming ineffective assistance of counsel when the state court concluded counsel was effective. Giving every state jurist veto power over the grant of federal collateral review vitiates the entire purpose of federal habeas review and nullifies the role of the federal judiciary to decide issues of constitutional law. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (Article III judges are "vested" with "judicial power" that extends over all cases over which federal courts have jurisdiction and it is emphatically the province and duty of the judicial department to say what the law is); *United States v. Klein*, 80 U.S. (13 Wall) 128 (1871) (Congress's attempt to dictate to the Court certain constitutional interpretations oversteps the required separation of powers between the legislative and judicial branches of government). In signing the AEDPA into law, the President made it clear that § 2254(d), as amended, was not intended to "limit the authority of the Federal Courts to bring their own judgment to bear on questions of law and mixed questions of law and fact"; otherwise, it

"would be subject to serious constitutional challenge." *Statement by the President Upon Signing the AEDPA of 1996 Into Law*, at 2-3 (April 24, 1996).

The misguided approach of the Sixth Circuit and the United States District Court, Eastern District of Michigan, in applying the appropriate standard of review for determining the reasonableness of counsel's actions does substantial damage to this Court's established habeas jurisprudence as articulated in *Strickland* and significantly erodes the Sixth Amendment's guarantee of counsel. These errors reflect a systemic dysfunction in applying the appropriate standard of review for ineffective assistance of counsel claims, which portends dire consequences for habeas litigants, such as Petitioner, who seek to challenge their convictions on the grounds of ineffective assistance of counsel. The only means of rectifying those errors is by granting Petitioner's writ for certiorari, and affording Petitioner *de novo* review to which she and subsequent habeas petitioners are entitled.

II. The Misconception That Expert Evidence of BWS Is Only Admissible in Cases Involving Self-defense Effectively Denied Petitioner the Opportunity to Present Expert Evidence Essential to Her Defense in Violation of Her Constitutional Rights.

Petitioner's claim for ineffective of assistance of counsel for failure to adequately investigate BWS and present expert testimony has been summarily denied by the lower courts, because, among other things, they wrongly believed that at the time it was only relevant to cases involving self-defense. [15] Obviously, the lower courts in the case *sub judice* did not comprehend BWS and its significance in criminal law. In order to properly address the issues presented, it is necessary to understand BWS.

Since the late 1970's, courts around the country have increasingly recognized that expert testimony on BWS is often necessary to give jurors the

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[15] The trial court erroneously held that BWS was a valid and common defense in 1989, but only in cases involving self-defense. The trial court made no indication that it would not admit expert testimony on BWS and stated that it would be a "step forward." *See,* Appendix F, p. 29a - 30a. The Michigan Court of Appeals indicated that BWS might be part of a claim of self-defense, but that it was not recognized in cases involving an abused person's conduct towards a third party. *See,* Appendix E, p. 21a. The federal courts had no opinion on the issue, because they erroneously deferred to the state courts. *See,* Appendix A, B, and C. Justice Levin of the Michigan Supreme Court believed that Petitioner's ineffective assistance of counsel claim should be reviewed in light of *People v. Christel*, 449 Mich. 578 (1995)(expert testimony regarding the "generalities or characteristics" of BWS may be admitted for the limited purpose of describing "the uniqueness of a specific behavior brought out at trial."). *See,* Appendix D.

tools they need to evaluate the conduct of a battered woman defendant and ensure a fair trial. The rationale of courts and legislatures for admitting evidence of the history of abuse in criminal trials of battered women is that jurors cannot understand or evaluate an abused person's claim or defense without fully understanding her experiences of abuse and history with the batterer.[16] Expert evidence on BWS is introduced in criminal trials to "show the trier of fact the context of defendant's actions." Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. Pa. L. Rev. 379, 426 (1991). Expert testimony educates the jury as to the cumulative effects of the abuse on the defendant and provides information that is not within the knowledge of the average layperson regarding the woman's experience of abuse.[17]

Although the admission of expert testimony regarding BWS evolved in the context of self-defense, it is not a defense. *See,* NIJ, Section I at 24; *United States v. Brown*, 891 F.Supp. 1501, 1505, 1506 (D. Kan.1995). Battered Woman's Syndrome is expert evidence and testimony in conjunction with lay testimony that is used to support a defense, including, but not limited to self-defense, duress, coercion, compulsion and mental impairment.[18]

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[16] Recently, in response to Congress' passage of the Violence Against Women Act (Public Law 103-322, Title IV), the National Institute of Justice/Department of Justice reported on and confirmed the validity and importance of evidence about battering in criminal trials. NIJ, Section 1, This report concluded, in part, that "[e]vidence and testimony about battering and its effects provide information germane to factfinders' deliberations in criminal cases involving battered women." NIJ, Section I at 22. In particular, "an extensive body of scientific and clinical knowledge"" strongly supports the validity and relevance of battering as a factor in the reactions and behavior of victims of domestic violence. NIJ, Foreword, at ii.

[17] *See, United States v. Hines*, 55 F.Supp.2d 62, 65, 72 (D. Mass. 1999)(expert testimony on BWS complies with the standards enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), because it assists the trier of fact since common sense inferences regarding BWS may well be off the mark.); *see also, United States v. Brown*, 891 F.Supp. 1501, 1507-1508 (D.Kan. 1995).

[18] *See also, Arcoren v. United States*, 929 F.2d 1235 (8th Cir. 1991) (BWS evidence admissible by state to explain battered woman's recantation of abuse claimed in her original police report); *State v. Cababag*, 850 P.2d 716 (Haw. 1993) (expert testimony on battering admissible to explain seemingly "bizarre" conduct of domestic violence victims, including minimization of the abuse and other related behaviors, which is beyond knowledge of ordinary juror); *State v. Slade*, 485 N.W.2d 839 (Wis. Ct. App. 1992) (in sexual assault, battery, and false imprisonment case, state expert's testimony regarding victims in abusive relationships relevant to provide alternative explanation for battered woman's conduct in not making greater efforts to resist or escape defendant); *People v. Minnis*, 455 N.E.2d 209 (Ill. 1983) (expert testimony on battering admissible to explain battered woman defendant's conduct, not only at

Evidence on battering has also been relevant to rebut or negate the prosecution's evidence that the defendant possessed the requisite "intent" or other culpable mental state. [19] The prosecution has also used expert testimony on BWS to explain the complainant's recanting prior testimony or statements against her batterer. [20]

Any contention that BWS is only relevant in cases in which self-defense is argued should be and has been rejected. Courts have considered the admissibility of BWS based on the facts of each case, not the general nature of the case. As the foregoing cases illustrate, the presence of a self-defense issue is not the determinative factor in deciding the admissibility of BWS. The case at bar mirrors the importance and the relevance of evidence regarding

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time of homicide, but also to explain her actions afterwards in dismembering her abuser, as it would have rebutted state's theory that this was evidence of consciousness of guilt); *United States v. Ramos-Oseguera*, 120 F.3d 1028 (9th Cir. 1997) (expert testimony on battering admitted in federal drug case to support battered woman defendant's duress claim); *United States v. Brown*, 891 F. Supp. 1501 (D.Kan. 1995) (after discovered evidence of battering warranted new trial since it would have explained defendant's state of mind and supported her compulsion defense in federal drug case); *People v. Romero*, 13 Cal. Rptr.2d 332 (Cal. App. 2 Dist. 1992). (expert testimony on battering was relevant to duress defense of battered woman defendant convicted of second-degree robbery with abusive boyfriend), *rev'd on other grounds*, 35 Cal. Rptr.2d 270, 883 P.2d 388 (1994); *State v. Williams*, 937 P.2d 1052 (Wash. 1997) (expert testimony on BWS admitted to support battered woman's duress claim in welfare fraud case); *United States v. Johnson*, 956 F.2d 894 (9th Cir. 1992) (in federal drug case, evidence of battering relevant to defendants' duress claims at trial, but if complete duress defense fails, then evidence of battering to support incomplete duress must be taken into consideration by sentencing court in making downward departure under sentencing guidelines).

[19] *See, e.g., Dunn v. Roberts*, 963 F.2d 308 (10th Cir. 1992) (denial of funds for expert on battering violated due process since battering was relevant to negate the specific intent element of the aiding and abetting statute); *United States v. Marenghi*, 893 F.Supp. 85 (D.Me. 1995) (in drug prosecution, evidence of BWS could be admissible to negate *mens rea* element of the crime); *Barrett v. State*, 675 N.E.2d 1112 (Ind. App.1996) (in child neglect case, expert testimony on BWS was admissible to rebut state's evidence and support battered woman's claim that she did not possess requisite specific intent), *transfer denied* (5/22/97); *State v. Lambert*, 312 S.E.2d 31 (W.Va. 1984) (defendant was entitled to present evidence of battering to negate criminal intent element of welfare fraud charge).

[20] *See, People v Christel*, 537 N.W.2d 194 (Mich. 1995); *People v Daoust*, 577 N.W.2d 179 (Mich. App. 1998), *leave denied*, 590 N.W.2d 64 (1999) *State v. Cababag*, 850 P.2d 716 (Haw. 1993); *Brandon v. State*, 839 P.2d 400 (Ak.App. 1992); *State v. Borrelli*, 629 A.2d 1105 (Conn. 1993); *Washington v. Ciskie*, 751 P.2d 1165 (Wash. 1988) (prosecutor allowed to present expert testimony on BWS in support of charges defendant raped his girlfriend several times over 9 months to explain why she did not report the rapes and did not leave the relationship).

battering and its effects in a case not involving self-defense. The character traits of battered women and the presence of those traits in Petitioner, both before, during and after the murder committed by Joe Bazzetta, her abuser, were relevant and admissible, because it would have provided evidence probative of Petitioner's behavior and, if accepted by the jury, would have negated much of the inculpatory evidence relied upon at trial. It would have also helped the jury understand Petitioner better; particularly her incongruous actions of professing her love for Joe Bazzetta and staying with him for many years after he murdered his stepmother, even though he subjected Petitioner to severe and often violent beatings.

By succumbing to the misconception that evidence of BWS is only admissible in cases involving self-defense, the trial court and the appellate courts have effectively denied Petitioner the opportunity to present evidence essential to her defense. This opportunity is mandated by the Sixth Amendment to the United States Constitution, which guarantees defendants the right to present evidence and witnesses on their own behalf. As this Court noted in *Washington v. Texas*, 388 U.S. 14, 19 (1967): [21]

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, [she] has the right to present [her] own witnesses to establish a defense. This right is a fundamental element of due process of law.

There exists no pervasive reason for limiting expert testimony on BWS to only those cases involving self-defense, as the lower courts in this case have suggested. Nor was expert evidence regarding BWS limited to cases of self-defense at the time of Petitioner's trial. It would be an anomaly to only allow a battered woman, who is on trial for killing her abuser, to offer expert testimony on BWS in order to help the jury understand the actions she took, yet deny Petitioner, who was tried for allegedly aiding and abetting her abuser in premeditated murder, the same opportunity and her constitutional right to present the same type of evidence for the same purpose. *Cf., Arcoren v.*

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[21] *See also, Crane v. Kentucky*, 476 U.S. 683 (1986); *California v. Trombetta*, 467 U.S. 479 (1984); *Strickland v. Washington*, 466 U.S. 668 (1984); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *see also, Dunn v. Roberts*, 963 F.2d 308 (10th Cir. 1992).

United States, 929 F.2d 1235, 1241 (8th Cir. 1991), citing, *State v. Frost*, 577 A.2d 1282, 1287 (N.J. 1990); *see also, Dunn v. Roberts*, 963 F.2d 308 (10th Cir. 1992)(denial of funds for expert on battering violated due process because battering was relevant to negate the specific intent element of the aiding and abetting statute); *People v. Romero, infra* at 338 ("If BWS is relevant to credibility when a woman kills her batterer, it is *a fortori* relevant when she participates in [a crime] at her batterer's insistence."). Considering the importance of the effects of battering to Petitioner's defense and the failure of her trial counsel to present expert testimony essential to her defense, this Court should grant Petitioner's writ because critical evidence was withheld from the jury, which so upset the adversarial balance between defense and prosecution, that the trial was rendered unfair and the verdict suspect. *See, Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986)(citation omitted).

III. The Denial of Petitioner's Claim of Ineffective Assistance of Counsel is in Conflict with this Court's Settled Jurisprudence and an Unreasonable Application of *Strickland*.

This Court has gone to great lengths over the years to insure that criminal defendants receive a fundamental element of due process - the right to counsel. *See, e.g., Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Escobedo v. Illinois*, 378 U.S. 478 (1964). This Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *Strickland*, at 687; U.S. Const., Am. V, VI, XIV. In *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986)(citation omitted), the Court stated:

> The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversarial process. The essence of an ineffective-assistance of counsel claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict suspect.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court established a two-pronged analysis for evaluating the effectiveness of counsel's assistance. In order to prove ineffective assistance of counsel, "the defendant must show both that counsel's representation fell below an objective standard of reasonableness, and that there exists a reasonable probability that, but for counsel's errors, the result of the proceedings would have been

different." *Kimmelman*, at 375 (citing *Strickland*, 466 U.S. 668, 694 (1984). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, at 694. It is not always necessary to show that the defective performance of counsel was outcome determinative. Petitioner need only show that counsel's performance was "less competent than the assistance that should be provided by a reasonable attorney under the same circumstances", or that it undermined the verdict's reliability. *Chambers v. Armontrout*, 907 F 2d 825, 828 (8th Cir, 1990); *Mak v. Blodgett*, 970 F 2d 614, 619 (9th Cir. 1992)

Throughout the appellate process, Petitioner has maintained that counsel's performance was deficient and that she was prejudiced by his performance, because he failed to obtain an expert on BWS and that he failed to adequately investigate BWS, which was essential to her defense and the theory of the case.[22] The Respondent has repeatedly characterized Petitioner's trial attorney's ineffectiveness of counsel as strategy, because *he made a decision* to proceed to trial without an expert allegedly due to his concerns that certain evidence would be proffered by the prosecution.[23] This characterization, and the concurrence of the lower courts, is in conflict with this Court's settled jurisprudence and an unreasonable application of *Strickland*. In applying the standard enunciated in *Strickland* to the issues in the present case, the trial court quoted:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and **strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.** In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness

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[22] As outlined in the statement of the case, this was not a reasonable investigation nor a reasonable tactical decision, particularly in light of the fact he knew he would have trouble explaining Petitioner's actions to the jury and would not be able to present certain lay testimony. (J.A. 87-92).

[23] The evidence concerned Joe Bazzetta's practice of devil worship, which was held to be inadmissible in Petitioner's trial by virtue of her trial attorney's Motion in Limine. Counsel proceeded to trial without obtaining a waiver on the record that Petitioner agreed to proceed to trial without an expert.

> in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, at 690-691. [Emphasis included in trial court's opinion]. *See*, Appendix F at p. 28a.

The state courts and the federal courts have failed to adequately consider that counsel was presented with information by Petitioner of the battering and its effects which, if pursued, would have led to the discovery of evidence that was essential to her defense. *See, e.g., Bouchillon v. Collins*, 907 F.2d 589 (5th Cir. 1990)(counsel ineffective for failing to investigate defendant's posttraumatic stress disorder, even though the Petitioner had told him of a history of mental illness); *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987)(counsel ineffective for failure to investigate, even though a court-appointed psychiatrist evaluated defendant, because his failure to investigate was below the level of customary skill and knowledge required of attorneys). For Petitioner's counsel in this case to do no investigation whatsoever at all on an issue that was essential to her defense is not a tactical decision.

> **Tactical decisions must be made in the context of a reasonable amount of investigation, not in a vacuum.**

Bouchillon, at 597.

It must be a very rare circumstance indeed where a decision not to investigate the use of an expert on BWS would be "reasonable" where, as here, counsel has notice of Petitioner's history of abuse as well as lay testimony regarding the abuse, but fails to do anything about it. *Cf., People v. Romero, infra* (counsel ineffective when he was aware of defendant's history of abuse and obtained the number of an expert on BWS, but when he was unable to reach the expert before trial, "he simply dropped the ball"). A fundamental flaw in Kaluzny's investigation was that he knew how important the effects of battering were going to be to Petitioner's defense, but he did nothing reasonable to pursue evidence to adequately support that defense, even though he knew the jury would have a difficult time believing her.[24]

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[24] During a pre-trial motion by the prosecution to exclude Robin Mingo's statement (*see, supra*, note 3), Kaluzny told the trial court:

> I think the jury is going to have some real questions about why she stayed

As the experts explained at the *Ginther* hearing, expert evidence on BWS would have deflected the prosecution's challenge to her credibility and it would have assisted the jury in objectively analyzing Petitioner's claim by dispelling many of the common misconceptions about battered women. The prosecution exploited several of these misconceptions in urging the jury to reject Petitioner's argument at trial. In his closing argument, the prosecutor stated:

> The defendant's testimony has consistently attempted to shift the blame from herself. **The defendant even went so far as to portray herself as being the victim in this case. This is not a new defense. I like to refer to it as the dubious art of shifting blame** . . . you should be careful not to allow a defendant to maneuver herself into the role of a helpless victim . . .

(J.A. 905-906).

> For five years, the Petitioner said nothing except to deny her involvement in the crime. She now claims that she was fearful of Joe, her husband, that he might hurt her if she talked. But remember, she broke up with him on at least two occasions, and on at least two occasions, they were miles apart. But the defendant, Michelle Bazzetta, never said a word. She let Helen's family wonder and wait for years.

> with this man for five years. And her explanation is, "Yes, I helped bury the body, but he threatened to kill me." And this is an example of when he tried to kill her. (J.A. 87-92).

During his closing argument, Kaluzny told the jury:

> The medical reports were introduced. You can look at that. Is she making it up that she was hit by a car? Now she didn't tell the authorities who did it. Can there be any doubt in your mind? But that's not what you are here to decide. Was she really under this fear from Joe or is that something she made up? She told you she was beaten almost beyond recognition a couple of times. Joe said, you're in this as much as I am. I'll never let you go. I'll drag you down with me. Those are the gist of the words she told you he said and the prosecutor wants you to think that oh, she should just waltz on in and tell somebody what happened. (J.A. 358-359).

See also, (J.A. 374 - 375, 377).

(J.A. 882)

Not only was there a reasonable probability that the jury was affected by the lack of expert testimony regarding battering and its effects on Petitioner, the judge apparently could not comprehend the concept either and was swayed by the prosecution's pronouncement about the myths of battering and its effects. At sentencing, he informed Petitioner:

> **I cannot understand your actions**. Reducing the **jargon** that has been used to describe your being a victim, I find it difficult, given your apparent mental capacity, your apparent strength of person. **I personally feel that you participated out of a weakness**, but that you willingly did so and did not do so unwillingly.

(J.A. 290)[emphasis added]. [25]

If the trial court could not understand Petitioner's actions, then how would the jury understand her actions without the benefit of expert testimony on battering and its effect on her? The trial court believed that the testimony of Petitioner, "which failed to convincingly explain her actions, was sufficient to communicate to the jury the terror and fear in which she lived." *See,* Appendix F, p. 29a. According to the court, Petitioner's lack of credibility was the greatest weakness in her defense, and an expert in the trial would have been nothing more than a redundancy. It was "clear" to the trial court that "the average person sitting on a jury could comprehend the concept of an individual living in fear and jeopardy and failing to report a crime." *Id.*, at 30a.[26] These misconceptions are precisely why expert testimony on BWS was necessary; *viz.*, to bolster Petitioner's credibility, to dispel the juror's perception that a woman in a battering relationship, such as Petitioner, is free to leave at any

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[25] *See,* Walker, *supra* at 23, 26. Other myths commonly believed about battered women are that battered women are uneducated, with few job skills, and that the police can protect the battered woman. *see also, Commonwealth v. Stonehouse*, 555 A.2d 772 (Pa. 1989), citing, Walker, at 19 (researchers have shown that many battered women are highly competent workers and successful career women, who include among their ranks doctors, lawyers, nurses, homemakers, politicians and psychologists).

[26] *See, Romero, supra,* at 336, citing, Martin, *Battered Wives* (1981) at pp. 78-79 ("Very few people understand this kind of fear . . . It is the fear of knowing someone is searching for you and will beat you when he finds you. In the mind of someone who has been badly beaten, this fear blots out all reason. The man seems omnipotent.").

time, and to counter any "common sense" conclusions by the jurors that if the beatings were that bad the woman would have left the batterer. *See, e.g., Dunn v. Roberts*, 963 F.2d 308 (10th Cir. 1992)(citations omitted).

It is unquestioned that Petitioner was seriously prejudiced by counsel's deficient performance. The jury was not provided with the essential expert testimony necessary to debunk the myths that still permeate the public perception of the dilemmas faced by battered women, and the prosecutor exploited those myths on cross-examination of Petitioner and during closing argument. The lack of expert evidence so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict suspect.[27]

Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989) is illustrative of the issue of ineffective assistance of counsel in the context of failure to present expert testimony detailing the impact battering has on a woman. Defense counsel in *Stonehouse* introduced evidence of the abuse itself, in order to show the defendant feared her abuser. He failed, however, to introduce expert testimony to explain the actions of the defendant in conjunction with the other facts of abuse, such as why the defendant, a trained police officer, perceived a need to kill her abuser to feel safe. The Supreme Court of Pennsylvania found defendant's counsel was ineffective and reversed defendant's conviction. In doing so, the court held that:

> Expert testimony would reveal that battered women view batterers as "omnipotent in terms of their ability to survey their women's activities," and that there are reasons for battered women's reluctance to seek help from others, such as fear, embarrassment, and the inability of police to respond in ways that are helpful to the battered woman."
>
> On the basis of such expert testimony, the jury could have found that appellant herein was a battered woman and that, like most battered women, appellant was isolated and justifiably believed that no one could help her solve her predicament except herself . . .

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[27] The trial court also felt that the evidence presented by Petitioner's attorney at trial was sufficient to warrant a significant reduction from the charge of first degree murder to a jury verdict of second-degree murder. Although Petitioner contends there was insufficient evidence to support such a verdict, she also contends that had expert testimony on BWS been presented to the jury, then there would have been a *reasonable probability* she would have only been found guilty of being an accessory after the fact or, possibly, even acquitted. *See*, Argument IV, pp. 26-30.

> . . . There was no reasonable basis for trial counsel not to call an expert witness to counter the erroneous battered women myths upon which the Commonwealth built its case. Thus, trial counsel was ineffective, and the absence of such expert testimony was prejudicial to appellant in that the jury was permitted, on the basis of unfounded myths, to assess appellant's claim . . .

Commonwealth v. Stonehouse, 555 A.2d 772, 785-785 (Pa. 1989)(citations and footnote omitted).

The case of *Dunn v. Roberts*, 963 F.2d 308 (10th Cir. 1992) is representative of the right of a defendant to present expert evidence on BWS relevant to her defense, because, "[w]ithout that assistance, defendant was deprived of the fair trial due process demands." *Id.*, at 313. In *Dunn*, the Tenth Circuit affirmed the grant of petitioner's habeas corpus relief and her entitlement to a new trial, because the petitioner had been denied funds to retain an expert to explain the essential characteristics of BWS. There the petitioner was prosecuted for aiding and abetting felony-murder, aggravated kidnaping, aggravated battery, and aggravated robbery. The prosecution's principal argument in support of its aiding and abetting theory relied heavily on petitioner's presence with her co-defendant at the time the crimes were committed and that she did not leave him. *Id.*, at 311. In light of the specific intent requirement of the aiding and abetting statute, the court found that petitioner's due process rights were violated by not being granted the funds to secure an expert. Such an expert, the court reasoned, was necessary to explain the nature battering and its effects would have had on defendant's ability to form the requisite intent. As such, she was precluded from presenting an effective defense. *Id.*, at 313. Petitioner in the case at bar was also denied her constitutional right to prevent an effective defense, and, as such, she was denied effective assistance of counsel by virtue of her trial attorney's failure to adequately investigate the use of expert testimony at her trial - testimony on battering and its effects which was essential to her defense.

The use of expert testimony is not, as the Respondent will suggest and the lower courts have agreed, limited to the context of self-defense. The failure of Petitioner's trial counsel to use expert testimony on battering and its effects constituted ineffective assistance of counsel and prejudiced Petitioner's right to a fair trial. The importance of expert evidence on battered women's syndrome was articulated in a concurring opinion by the Honorable Nathaniel R. Jones in *Thomas v. Arn*, 728 F.2d 813, 815 (6th Cir. 1984), *aff'd* 474 U.S.

140 (1985). [28] Judge Jones wrote:

> [I]f I were to reach the merits of this case I would grant the writ of habeas corpus. In my view, the trial court's exclusion of expert testimony on the "battered wife syndrome" impugned the fundamental fairness of the trial process thereby depriving Thomas of her constitutional right to a fair trial. There is sufficient literature which suggests that the public and thus, juries, do not understand the scope of the problem concerning battered women.
>
> The law cannot be allowed to be mired in antiquated notions about human responses when a body of knowledge is available which is capable of providing insight.

Thomas, at 815.

Considering the importance Petitioner's trial counsel placed on explaining her actions to the jury, the lack of a reasonable investigation by him into obtaining an expert on BWS was clearly deficient and this performance was prejudicial to Petitioner. Although the trial judge suggested several reasons for denying Petitioner received ineffective assistance of counsel, his reasoning, in and of itself, is an unreasonable application of *Strickland* and is in conflict with this Court's settled jurisprudence as well as the majority rule that expert testimony of the effects of battering on a woman is admissible to explain a defendant's behavior. His reasoning was tantamount to circling the wagons; a circle which should be breached by this Court. There are several cases, as well as those cited above, that amply demonstrate the unreasonable application of the lower courts's decision in this case to *Strickland* in terms of inadequate investigation.[29] These decisions not only underscore the

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[28] The majority did not consider the merits of the case, because the petitioner had failed to properly file objections to the magistrate's report and recommendation, which was affirmed by this Court.

[29] *See, e.g., Holsomback v. White*, 133 F.3d 1382 (11th Cir. 1998)(counsel ineffective for failing to conduct adequate pre-trial investigation); *Code v. Montgomery*, 799 F.2d 1481, 1484 (11th Cir. 1986) (counsel ineffective for failing to interview or present alibi witnesses); *United States v. Tarricone*, 996 F.2d 1414, 1419 (2nd Cir. 1993)(counsel ineffective in failing to present a handwriting expert; even though there was ample other evidence to support conviction); *Groseclose v. Bell*, 130 F.3d 1161, 1170 (6th Cir. 1997) (counsel ineffective for not investigating the things that were crucial to developing what could have been a successful defense); *Hall v.*

unreasonableness of the lower courts' application of *Strickland* to this case, they graphically illustrate the "reasonable probability" that, but for trial counsel's substantial and inexcusable errors in presenting Petitioner's defense, she would not have been convicted of second-degree murder, particularly in light of the fact that the evidence against her was not overwhelming. Because of the constitutional magnitude of the claims here, this Court should grant Petitioner's request for a writ.

IV. The Denial of Petitioner's Claim of Insufficient Evidence to Convict for Second Degree Murder Under and Aiding and Abetting Theory is in Conflict with this Court's Settled Jurisprudence, an Unreasonable Application of *Jackson v Virginia* and an Unreasonable Determination in Light of the Evidence Presented.

It is well settled that due process requires that in a criminal prosecution, the government must prove *each and every essential element* of the charged crime beyond a reasonable doubt. U.S. Const., Ams. V, XIV; Mich. Const. 1963, art. 1, §17; *In re Winship*, 397 US 358, 364 (1970); *Jackson v. Virginia*, 443 US 307, 317 (1979). In deciding whether a conviction is based on sufficient evidence, the reviewing court "must consider not whether there was any evidence to support the conviction but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt." *Jackson*, at 316. Some evidence of guilt is not sufficient. *Id.* The evidence must do more than show the possibility or probability that a defendant is guilty. *Fuller v. Anderson*, 662 F2d 420 (6th Cir. 1980); *Spegner v. Jago*, 603 F2d 1208 (6th Cir. 1979); *Cage v Louisiana*, 498 U.S.

Washington, 106 F.3d 742, 749 (7th Cir. 1996)(counsel's decision not to call witnesses deserves no deference under *Strickland* where counsel did not investigate what witness testimony would be), *cert. denied*, 118 S.Ct. 264 (1997); *Mak v. Blodgett*, 970 F.2d 614, 619 (9th Cir. 1992)(counsel ineffective for failing to present expert testimony on stoic demeanor of Chinese born defendant); *Glen v. Tate*, 71 F.3d 1204, 1211 (6th Cir. 1995)(clear prejudice where trial counsel failed to present mental history and evidence of defendant's near-retardation); *Martinez-Macias v. Collins*, 810 F.Supp. 782 (W.D.Tex. 1991)(ineffective assistance to forego investigation and use of family member's testimony without knowledge of what that testimony would be), *aff'd.* 979 F.2d 1067 (5th Cir. 1992); *Genius v. Pepe*, 50 F 3d 60 (1st Cir. 1995)(counsel ineffective because he failed to present an insanity defense; where insanity would have been a complete defense, it was inexcusable not to pursue it); *Parkus v. Delo*, 33 F 3d 933 (8th Cir. 1984)(counsel ineffective where he failed to discover allegedly destroyed mental health records and were later found by appellate counsel); *People v. Johnson*, 545 N.W.2d 637 (Mich. 1996)(counsel ineffective for failing to produce inculpatory evidence that could have changed the outcome of the trial).

39 (1990). Rather, it must be sufficient to prove every single element of the offense beyond a reasonable doubt.

In *Winship, supra,* at 364, this Court stressed that the reasonable doubt standard is to protect the individual from being convicted unless that person's guilt of that offense is proven "with utmost certainty". Evidence is not sufficient to prove guilt beyond a reasonable doubt simply because there is "some evidence" from which to infer guilt. This Court in *Jackson* and the Michigan Supreme Court in *People v. Hampton*, 285 N.W.2d 284 (1979) rejected as inconsistent with due process the rule that as long as there is "some evidence" from which to infer guilt, a conviction may be sustained:

> The fact that some evidence is introduced does not necessarily mean that the evidence is sufficient to raise a jury issue. Because there is no requirement that the evidence be sufficient to support a conviction to be admissible, it does not necessarily follow that merely because some evidence is admitted, the evidence is sufficient to raise a jury issue. In quantitative terms, the fact that a piece of evidence has some tendency to make a fact more probable, or less probable, does not necessarily mean that the evidence would justify a reasonable juror in reasonably concluding the existence of that fact beyond a reasonable doubt.

Petitioner was tried under the theory that she aided and abetted Joe Bazzetta in the first degree murder of his stepmother. Joe Bazzetta confessed to the murder and was convicted of first degree murder. *See,* Appendix F, p.30a. Although there was insufficient evidence that Petitioner aided and abetted in the first degree murder committed by Joe, she was convicted of second degree murder. This conviction cannot be logically sustained, nor was the evidence sufficient to convict under the standards enunciated in *Jackson* or the standards of review available under the AEDPA. *See,* 28 U.S.C. § 2254(d)(1) and (2).

Under Michigan Law, the distinction between principal and accessory after the fact, and between principal in the first and second degree was abolished by statute, however, an accessory after the fact remains a common law offense. MCL 767.39; MSA 28.979; *People v. Williams*, 324 N.W.2d 70 (Mich.App. 1982). MCL 767.39 dictates that: "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." To support a finding that a defendant aided

and abetted a crime, the prosecutor must show that: (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Jones*, (On Rehearing) 506 N.W.2d 542 (1993). The instant offense committed by Joe Bazzetta, first degree murder, is a specific intent crime; whereas, second degree murder is a general intent crime without that premeditation and deliberation which distinguishes it from first degree murder. *See, People v. Bryant*, 204 N.W.2d 746 (Mich. App. 1972); *see also, People v. Stinson*, 227 N.W. 303 (Mich.App. 1975).(homicides which are unplanned or impulsive are murder in the second degree). Therefore, to convict Petitioner of aiding and abetting first degree murder, the evidence must be sufficient to show that Petitioner had the intent to kill Helen Bazzetta or given aid to Joe Bazzetta knowing he had the requisite intent. *See, People v. Kelly*, 378 N.W.2d 365 (Mich. 1985). Rather, the defendant must specifically intend to assist in the commission of a premeditated and deliberate act of murder. Premeditation and deliberation may be inferred from the facts and circumstances, but the inferences must have support in the record and cannot be arrived at by mere speculation. *See, People v. Plummer*, 581 N.W.2d 753 (Mich. 1998).

The evidence in the case below clearly showed that the murder committed by Joe was premeditated and deliberate, but there was insufficient evidence to support that Petitioner had the requisite intent to kill Helen Bazzetta or that she had given aid to Joe Bazzetta knowing he had the requisite intent. The record illustrates the difficulties between Joe and the victim. Although Petitioner was aware that Joe wanted to kill Helen, she never thought he was serious. (J.A. 149-150). This was insufficient evidence to support the prosecution's theory that Petitioner was guilty of aiding and abetting Joe in the first degree murder of Helen as was the remaining evidence cited in the district court's opinion. *See*, Appendix B, p. 12a-13a.

Michigan courts have consistently held that criminal liability demands individual culpability, and mere association or presence is wholly insufficient to establish criminal wrongdoing: "Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor or a principal in the second degree nor is mere mental approval, sufficient, nor passive acquiescence or consent." *People v Burrel*, 253 Mich. 321, 323 (1931); *People v Turner*, 336 N.W.2d 217 (1983). The evidence presented at trial cannot be said beyond a reasonable doubt to have shown that Petitioner aided and abetted Joe Bazzetta in the first degree murder of Helen. While circumstantial evidence, taken in

the light most favorable to the prosecution, may have shown that Joe Bazzetta had repeatedly indicated to Petitioner and others that he wanted to kill Helen Bazzetta, it did not show that Petitioner did anything to intentionally assist in the commission of Joe Bazzetta's premeditated act of murder. The evidence was clear that Petitioner did not make any statements about harming Helen, nor was there any evidence that she encouraged or incited Joe to murder Helen. Petitioner's knowledge of what she considered euphemistic statements that Joe wanted to kill Helen were tantamount, at most, to the "passive acquiescence" that the court in *Burrel* held was insufficient to convict.

The only evidence that Petitioner may have allegedly been involved in the planning to murder Helen Bazzetta was offered by prosecution through the testimony of Detective Hummel.[30] Petitioner's attorney maintained that Hummel's testimony was not an accurate reflection of the events that occurred during the interview in question, however, he was not allowed to testify. This evidence that Petitioner allegedly planned to bury the prior to the first degree murder committed by Joe was insufficient to convict Petitioner for second degree murder under an aiding and abetting first degree murder theory. Such a conviction is unsupported by the evidence and illogical. [31]

At most, the evidence offered at trial implicated Petitioner as an accessory after the fact. MCL 767.39; MS 28.979; MCL 750.505; MS 28.773. An accessory after the fact is not an aider and abetter. *See, People v.*

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[30] He testified that he was present during an interview with Petitioner and her trial counsel, but that he was only taking notes and not asking her questions. (J.A. 320; 328-329). He also admitted that the five hour interrogation was not transcribed or recorded, that Petitioner repeatedly maintained she did not plan or assist Joe in his murder of Helen and that she was never allowed to read over the notes to see if they were an accurate reflection of her statement. (J.A. 345-347). Petitioner stated that Joe had talked about killing Helen on many occasions, but that she interpreted it as a euphemism and never took him seriously. (J.A. 149-150). She was consistent in her statement that there was no discussion between Joe and her about how to dispose of the body before the killing, only after. (J.A. 139-140; 203-204). On one occasion, Detective Hummel believed or understood her to say that the discussion concerning burial took place prior to the murder. He admitted, however, that Petitioner later clarified that she meant the discussion took place after Joe murdered Helen. (J.A. 139-140; 345-348)

[31] Several panels of the Michigan Court of Appeals have reasoned that the crime of conspiracy to commit second degree murder is illogical because of the inconsistent intent elements of criminal conspiracy (specific) and second-degree murder (general) and held that conspiracy to commit second-degree murder does not exist as a crime. *People v. Fernandez*, 372 N.W.2d 567 (Mich.App.1985), *rev'd on other grounds*, 398 N.W.2d 311 (Mich.1986); *People v. Jackson*, N.W.2d 613 (Mich.App.1982), *rev'd on other grounds*, 365 N.W.2d 56 (Mich. 1984); *People v. Hamp*, 312 NW2d 175 (Mich.App. 1981). The Michigan Supreme Court expressly declined to resolve the issue whether the offense exists as a lesser included offense of conspiracy to commit first-degree murder. *People v. Fernandez*, 398 N.W.2d 311 (Mich. 1986).

Karst, 324 N.W.2d 526 (Mich.App.1982). Where a defendant has been convicted upon a charge for which there is insufficient evidence, such as here, defendant's due process has been violated *See, Thompson v. Louisville*, 362 U.S. 199 (1960). Due process requires submission as possible verdicts only those lesser included offenses that are supported by the evidence. *See, Beck v. Alabama*, 447 U.S. 625 (1980); *see also, North Carolina v. Arnold*, 404 S.E.2d 822 (N.C. 1991)(submission of second degree murder to jury on evidence that defendant aided and abetted in the premeditated murder of victim was a violation of due process and not supported by the evidence).

Petitioner's conviction for second degree murder under the prosecution's aiding and abetting first degree murder theory was not supported by legally sufficient evidence, even if viewed in a light most favorable to the prosecution, and violated Petitioner's constitutional right to due process of law. U.S. Const., Amend. XIV; *Jackson v. Virginia*, 443 U.S. 307 (1979). Petitioner's conviction should have been reversed by the lower courts, and the matter remanded for a new trial, because denial of Petitioner's claim of insufficient evidence to convict her of second degree murder under an aiding and abetting theory is in conflict with this Court's settled jurisprudence, an unreasonable application of *Jackson v Virginia* and an unreasonable determination in light of the evidence presented. As such, this court should issue of a writ of certiorari.

Conclusion

For the foregoing reasons, the Court should grant certiorari in this case.

Respectfully submitted,

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APPENDIX A
No. 98-1946

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHELLE BAZZETTA,
Petitioner-Appellant,

v.

JOAN YUKINS,
Respondent-Appellee.

Appeal from the United States District Court
For the Eastern District of Michigan
Barbara Hackett, District Judge, Presiding

Filed - December 2, 1999

Memorandum Opinion
(Not Recommended for Publication)

Before: KEITH, NORRIS, and CLAY, Circuit Judges.

PER CURIAM. Michelle Bazzetta appeals from the order of the district court denying her petition for a writ of habeas corpus. On appeal, she contends that the district court erred when it rejected her contentions that her trial counsel was ineffective and that there was insufficient evidence to support a conviction for second degree murder.

Having had the benefit of oral argument and having carefully considered the record on appeal, the briefs of the parties, and the applicable law, we are not persuaded that the court erred in denying the petition.

Because the reasoning which supports denial of the petition for a writ of habeas corpus has been articulated by the district court, the issuance of detailed written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the judgment of the district court is affirmed upon the reasoning employed by that court in its Opinion and Order filed on July 9, 1998.

APPENDIX B

Civil Action No. 96-60314-AA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE GRANDIS BAZZETTA, Petitioner,

v.

JOAN YUKINS, Respondent.

Opinion and Order Denying Habeas Corpus Petition

I. Introduction

Petitioner Michelle Grandis Bazzetta is presently incarcerated in the Scott Correctional Facility located in Plymouth, Michigan. Petitioner has filed this application for writ of habeas corpus under § 28 U.S.C. 2254 challenging her conviction for second degree murder. For the reasons set forth below, Petitioner's request for a writ of habeas corpus is denied.

II. Background

On October 11, 1989, a jury convicted Petitioner of second-degree murder. Petitioner was tried jointly with her husband for the murder-strangulation of her [sic] stepmother. The factual background leading to Petitioner's conviction, as drawn from the trial transcripts as well as various opinions that have been issued in this case, is set forth below. In early 1983, Petitioner began dating a man named Joseph Bazzetta (hereinafter referred to as "Joseph"). Joseph's mother had died the year before, and his father had since remarried a woman named Helen. Helen and Joseph had a strained relationship which deteriorated further when Helen found out that Joseph was dating Petitioner, who, at the time, was a topless dancer. Helen told Joseph that he was not allowed to have Petitioner over to the Bazzetta home. On several occasions Joseph disobeyed his step-mother's request, and had Michelle stay the night in his bedroom which was located in the basement. On one occasion, Helen found Petitioner in the basement and threw her out of the home. It is undisputed that Helen and Michelle did not like each other. During the month

of July, 1983, Joseph's father was in St. Louis on an extended business trip and Helen left the country to visit her son from a former marriage in Germany. During this time, Petitioner and Joseph frequently stayed in the Bazzetta home together, At the end of the month, after briefly meeting her husband in St. Louis, Helen traveled to her home in Warren, Michigan.

On August 1, 1983, Helen played nine holes of golf and then made a trip to the grocery store in anticipation of her husband arriving back in town within the next few days. Helen then returned home with the groceries. That morning Petitioner and Joseph were in the basement. When Joseph heard Helen come home, he told Petitioner, as he had done before, that he was going to kill Helen. Petitioner was half-asleep and assumed Joseph wasn't serious. However, a few minutes later Petitioner heard screams and a thud. She came upstairs to see what was going on, and found Joseph strangling Helen.

Helen died as a result of the strangulation, after which Joseph proceeded to cover her head with a plastic bag. During the struggle Joseph had hit Helen with a baseball bat causing her head to bleed severely. Joseph then wrapped Helen's entire body in black visqueen that was to be used for landscaping the yard. He instructed Petitioner to get a blanket, which she did. Joseph wrapped the blanket around the visqueen, dragged the body through a nearby backdoor, and then he pulled his car around and loaded Helen's body into the trunk. Petitioner was told to clean up the blood splattered around the kitchen. She did so. Petitioner also fixed a shelf that had fallen during the struggle, and then proceeded to stuff the grocery bags, filled with food, haphazardly into the refrigerator. Joseph told Petitioner to wear a pair of gloves, which he provided, and take Helen's car to Oakland mall where he would meet her in a few minutes. Petitioner did so. After Joseph arrived in the parking lot of the mall, Petitioner got in his car. They talked about burying Helen's body in a wooded area near a trailer park some forty-six miles from the Bazzetta home. During Petitioner's trial, testimony indicated that the evening prior to the murder, Petitioner visited the trailer park with Joseph and they both discussed burying Helen there. On their way to the trailer park with Helen's body, they stopped at a Frank's Nursery and Crafts where Joseph bought some plants that he believed would help camouflage the grave. Then they proceeded to the wooded area. Joseph dug a grave for Helen's body. Joseph told Petitioner to help move some rocks, which she did. After the body was placed in the grave, Petitioner replaced the rocks over the body. When they were done burying Helen, Petitioner and Joseph bought a bottle of wine and went to a motel for the night. Subsequent to the murder, Petitioner threw away Helen's purse, along with all of the clothes that Petitioner was wearing

the day of the murder, in a dumpster in the city of Detroit.

Helen's sisters placed a missing persons report with the local police department, and large organized searches were conducted with the help of several volunteers. Among those who offered to help were Joseph and Petitioner. During the weeks after Helen's disappearance, according to testimony from an acquaintance of Petitioner's, Petitioner attempted to fabricate an alibi for herself on the day of the murder. Another witness testified overhearing Petitioner say that Helen was a "bitch", and that Joseph's father was better off without her.

Petitioner and Joseph stayed together for several years after Helen's murder. On numerous occasions, Petitioner threatened to leave Joseph and tell authorities of Helen's whereabouts. However, Petitioner stayed with Joseph, who seriously beat Petitioner time and again over the years. On one occasion, Joseph ran over Petitioner with his car. Expert testimony given at a hearing subsequent to Petitioner's trial suggested that Petitioner suffered from Battered Spouse Syndrome, and accounted for her staying with Joseph for several years after Helen's death. During this time, Helen's body was not found.

In April, 1988, a local man out on a treasure hunt came upon Helen Bazzetta's body. Thereafter, Petitioner and Joseph, who had moved several times back and forth from California and Michigan, heard that the body was found and decided to get married intending to obtain spousal immunity so as to preclude possible testimony concerning their actions. Four days after the wedding, Petitioner and Joseph were arrested. Petitioner then gave a series of statements to police which implicated herself and Joseph in the death of Helen Bazzetta.

Petitioner acknowledged that Joseph had talked on many occasions about killing Helen, including the statement Joseph made on August 1, 1983. Detective Hummel, who spoke with Petitioner shortly after her arrest, testified on direct examination as follows:

> Q Okay. On the 3 1 st of July which was the Sunday did she [Petitioner] indicate whether or not she discussed with Joey where Helen would be buried?
>
> A Yes. She indicated that when asked if he had ever planned to bury Helen she indicated that he had discussed burying her at the trailer park, that it was

Joey's idea to take her there but they had both discussed it.

Q And would this have been prior to the murder itself?

A Yes, it would have been.

Q When was she referring to?

A I believe her to be referring to the 31st, that Sunday, that evening.

Q The day before the murder?

A That's correct.

Q That they had both discussed burying her at the trailer park?

A That's correct.

(Trial Transcript [hereinafter referred to as "T.T."] at p. 596-597).

During the five hour police interrogation, however, Petitioner repeatedly maintained that she did not plan or assist in Helen Bazzetta's murder. (T.T. pp. 603, 606, 613).

At trial, detective Hummel testified that after her arrest, Petitioner admitted that she and Joseph discussed burying Helen in the woods by the trailer park on the night before the murder. (T.T. p. 820). However, he acknowledged that Petitioner subsequently changed her story and maintained that they discussed the burial site only after the murder. (T.T. p. 820). This testimony was apparently the focus of jury deliberations as it was reread at their request, along with Petitioner's testimony relative to that point.

The jury found Petitioner guilty of second degree murder. Defense counsel moved for judgment notwithstanding the verdict. The motion was denied. The trial judge sentenced Petitioner to life in prison. Following her conviction, Petitioner appealed as of right. The Court of Appeals remanded the case to the trial court so Petitioner could file a motion for a new trial based on her claim of ineffective assistance of counsel, i.e., that her trial counsel was

ineffective for failing to obtain expert testimony that Petitioner suffered from Battered Spouse Syndrome. A hearing was held on this issue in June, 1992, and expert testimony was presented. After considering the claim, the trial court issued a carefully reasoned opinion denying Petitioner's motion. *People v. Michelle Grandis Bazzetta*, Oakland County Circuit Court No. 88-086394. The Michigan Court of Appeals denied the merits of Petitioner's claims presented in her appeal of right. *People v. Michelle Marie Grandis Bazzetta*, Court of Appeals No. 123769 (September 8, 1994). The Michigan Supreme Court denied Petitioner's leave to appeal in a standard order. *People v. Michelle Marie Grandis Bazzetta*, Supreme Court No, 101564, 450 Mich, 854, 53 8 N.W.2d 680 (August 25, 1995).

After exhausting all of her state court remedies, Petitioner filed the instant application for a writ of habeas corpus with this Court on September 20, 1996, raising the following claims:

1. Trial counsel was ineffective for failing to investigate and present adequate defense evidence of Petitioner's status as a battered woman which deprived her of this critical part of her defense in violation of her federal Sixth Amendment and Due Process constitutional rights to counsel and to present a complete and effective defense.

2. The Court of Appeals erroneously rejected Petitioner's argument that the evidence in this case was insufficient to support a conviction of second degree murder, violating Petitioner's right to Due Process under the federal constitution.

3. The prosecutor's repeated misconduct was so egregious that it wholly undermined the fairness of the trial, rendered the verdict unreliable, and deprived Petitioner of Due Process and an impartial trial by jury as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the federal constitution.

4. The trial court failed to properly instruct the jury on venue and Petitioner was thereby deprived of an instruction on an element of the offense, in violation of her federal constitutional right to Due Process.

5. The court's sentencing reasons violated Petitioner's right to Due Process at sentencing and freedom of religion under the First Amendment of the federal constitution.

6. Even if no single error warrants reversal, the cumulative errors in criminal proceedings against petitioner cannot be held harmless and their cumulative effect clearly requires a new trial.

Respondent maintains that Petitioner has not established entitlement to relief under the standards governing habeas corpus cases, and that her application should be denied. This Court agrees with Respondent.

III. Analysis

A. Standard of Review

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The AEDPA includes significant amendments to 28 U.S.C. §§ 2244, 2253, 2254, 2255, which govern habeas corpus proceedings in federal courts. Habeas cases filed after April 24, 1996, are subject to the amendments without exception.' With respect to the standards governing habeas cases, 28 U.S.C. § 2254(d) provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme court of the United States, or
>
> (2) resulted in a decision that was based on an unreasonable determination in light of the evidence presented in the State court

proceeding.

Subsection (d)(1) deals with habeas challenges based on errors of law or mixed questions of law and fact, while subsection (d)(2) applies to challenges based on purely factual errors. *See Drinkard v. Johnson*, 97 F.3d 751, 767-68 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 1114 (1997).[32] Based on the nature of the claims contained in the instant application, subsection (d)(1) is the appropriate standard of review to be employed in the resolution of this petition for writ of habeas corpus.

Under subsection (d)(1), a petitioner will be entitled to relief only if the state court's decision of a purely legal issue was contrary to clearly established law as decided by the Supreme Court, or if the court's application of that law to the facts was unreasonable. *See Drinkard v. Johnson*, 97 F.3d at 768-69. This standard is more deferential than the pre-AEDPA-standard. *Stone v. Farley*, 86 F.3d 712, 716 n.3 (7th Cir. 1996). The Sixth Circuit has not addressed the issue of what would constitute an unreasonable application of clearly established federal law, and therefore it is necessary to look to other circuits for guidance on this point. This Court, as well as at least one other Court in this District, finds the approach taken by the Seventh Circuit to be useful for analyzing habeas cases under the AEDPA. *See Nevers v. Killinger*, --- F.Supp.---, 1997 WL 816107 (E.D.Mich. 1997).

In *Hennon v. Cooper*, 109 F.3d 330 (7th Cir. 1997), the court stated that the "criterion of a reasonable determination is whether it is . . . at least minimally consistent with the facts and circumstances of the case." Id. at 335. The Seventh Circuit acknowledges that the standard allows state court determinations to stand if it is one of several equally plausible outcomes. *Hall v. Washington*, 106 F.3d 742, 748-49 (7th Cir. 1997). However, the Hall court went on to state that:

> [C]ongress would not have used the word "unreasonable" if it really meant that federal courts were to defer in all cases to the state court's decision. Some decisions will be at such tension with governing U.S. Supreme Court precedents, or so inadequately supported by the record, or so arbitrary, that a

---

[1] Petitioner sets forth several arguments in support of her position that the AEDPA standard of review should not apply to her case, even though the application was filed after the date of enactment. This Court is unpersuaded by Petitioner's arguments and applies the standard as set forth more fully in this section of the Court's Opinion.

writ must issue.

Id.; *Nevers*, 1997 WL 816107 at *7. Accordingly, "it is up to the federal courts to determine, in light of the facts and the applicable law, whether the state court decision was reasonable." *Nevers*, 1997 WL 816107 at *8. With these considerations in mind, the Court proceeds to the merits of the instant petition.

B. Effective Assistance of Counsel

After Petitioner was found guilty of second degree murder and sentenced to life in prison, she filed a motion for a new trial in which she argued that she received ineffective assistance of counsel. An evidentiary hearing that lasted for four days was held on Petitioner's motion, after-which the trial judge issued a carefully reasoned nine-page opinion finding that Petitioner received the effective assistance of counsel using an analysis from *Strickland v. Washington*, 466 U.S. 668 (1984). Under the standards governing habeas cases, habeas relief is to be granted only if the state court's application of the Strickland analysis was unreasonable.

In *Strickland v. Washington*, the Supreme Court set forth a two-pronged test for determining whether a habeas petitioner has received ineffective assistance of counsel. *Strickland*, 466 U.S. at 687; *Blackburn v. Foltz*, 828 F.2d 1177, 1180 (6th Cir. 1987), *cert. denied*, 485 U.S. 970 (1988). First, a petitioner must prove that counsel's performance was deficient. This requires a showing that counsel made errors so serious that he or she was not functioning as counsel as guaranteed by the Sixth Amendment. *Id.* Second, the petitioner must establish that the deficient performance prejudiced the defense. Counsel's errors must have been so serious that they deprived the petitioner of a fair trial. *Id.* The reviewing court's scrutiny of counsel's performance is highly deferential. *Strickland*, 466 U.S. at 689. The court must recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690. With respect to the first prong, a petitioner must identify acts that were "outside the wide range of professionally competent assistance" in order to prove deficient performance. *Id.* With respect to the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *Sims v. Livesay*, 970 F.2d 1575, 1581 (6th Cir. 1992). A reasonable probability is one that is sufficient to undermine confidence in the outcome, *Id.*

In the case at bar, the trial court quoted extensively from Strickland and concluded as follows:

> [T]his court does not feel, having observed the entire trial and hearing the additional testimony, that the absence of an expert was a factor sufficient to constitute a violation of the Defendant's rights as set forth in Strickland, *supra*, as adopted in Tommolino, *supra*.

People v. Michelle Marie Grandis Bazzetta, Oakland County Circuit Court No. 88-086394, at pp. 9-10.

After a careful review of the record in this case, the Court finds that the Michigan trial court's determination that Petitioner was not denied effective assistance of trial counsel was not an unreasonable application of *Strickland*. Therefore, habeas claim one is denied.

C. Sufficiency of Evidence

Petitioner claims that there was insufficient evidence to convict her of second degree murder on an aiding and abetting theory. With respect to this claim, the Michigan Court of Appeals stated as follows:

> Defendant first contends that there was insufficient evidence to support her conviction. We disagree. There was evidence that both defendant and Joseph disliked Helen and that defendant was aware that Joseph wanted to kill his stepmother. A detective who interviewed defendant testified that she stated that she and Joseph discussed burying Helen's body before the murder. The burial site was near the trailer park where defendant lived as a child. There was also evidence that defendant attempted to fabricate an alibi for the time of the murder. The credibility of the witnesses and the weight of the evidence was for the jury to determine. *See People v. Wolfe*, 440 Mich. 508, 514; 489 N.W.2d 748 (1992). Viewed in light most favorable to the prosecution, the jury could find from the evidence that Joseph's murder of Helen was premeditated and deliberate, that defendant knew that Joseph intended to kill Helen, and that she aided him in the commission of the crime. *People v. Schollaert*, 194 Mich. App. 158, 170; 486 N.W.2d 312 (1992); *People v. Buck*, 197

Mich. App. 404, 410; 496 N.W.2d 321 (1992), modified in part on other grounds *sub nom People v. Holcomb*, 444 Mich. 853; 508 N.W.2d 502 (1993); *Wolfe, supra.*

People v. Michelle Marie Grandis Bazzetta, Court of Appeals No. 123769 (September 8, 1994).

A state court's findings of fact on the sufficiency issues are entitled to a presumption of correctness unless it is established by clear and convincing evidence that the factual determination in the state court was erroneous. 28 U.S.C. § 2254(e)(1); *West v. Seabold*, 73 F.3d 81, 83 (6th Cir.), *cert. denied*, 116 S. Ct. 2569 (1996). Petitioner challenges the Court of Appeals decision, arguing that even if the factual scenario the Court of Appeals sets forth is true, it still could not legally amount to a conviction of second degree murder on an aiding and abetting theory.

Prior to the enactment of the AEDPA, when reviewing a state court conviction with regard to sufficiency of the evidence, a federal habeas corpus court would consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Respondent argues that a more deferential standard is to be employed after the enactment of the AEDPA, citing *Gomez v. Acevedo*, 106 F.3d 192 (7th Cir. 1997). In *Gomez*, a sufficiency of evidence case, the court held that habeas relief may now be granted for such a claim "only if the state courts have unreasonably applied the Jackson standard." *Id.* at 199.

> Federal review of these claims therefore now turns on whether the state court provided fair process and engaged in reasoned, good faith decision making when applying Jackson's "no rational trier of fact" test. As we stated in *Lindh v. Murphy* 96 F.3d 856 (7th Cir. 1996), *rev'd on grounds other than standard of review*, 521 U.S. _, 117 S.Ct. 2059 (1997)] § 2254(d)(1) "requires federal courts to take into account the care with which the state court considered the subject ... [A] responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment." 96 F.3d at 871. *Id.*

On October 6, 1997, the Supreme Court vacated the Seventh Circuit's

decision in *Gomez* in light of *Lindh v. Murphy*, 117 S.Ct. 2059 (1997), in which the Court held that the AEDPA amendments to the habeas statute do not apply to petitions which were filed before the enactment of the AEDPA. *See Gomez v. DeTella*, 118 S.Ct. 37 (1997). Thus, the Seventh Circuit's decision in *Gomez* lacks any precedential value. Nevertheless, the court's decision accurately and succinctly sets forth the standard to be applied to the sufficiency of the evidence claims under the AEDPA, and is worthy of discussion even though it has been vacated. Decisions of other courts dated after October 6, 1997, have done likewise. *See, e.g., Diaz v. Moore*, Nos. 97-6586, 6604, 1998 WL 112526, at *2 (4th Cir. March 16, 1998); *Medley v. Gramley*, -- F.Supp.--,--, 1997 WL 790565, at *8 -*9 (N.D. Ill., Dec. 26, 1997). Additionally, this Court notes that the plain language of the standards set forth in 28 U.S.C. § 2254(d) makes no exception for cases raising issues of insufficient evidence.

The Michigan Court of Appeals, in addressing Petitioner's claim of insufficient evidence, cited, *People v. Wolfe*, 440 Mich. 508, 489 N.W.2d 748 (1992). Because Wolfe drew its standard for reviewing sufficiency of evidence claims from *Jackson v. Virginia, supra*, the precise question before this Court becomes whether the Michigan Court of Appeals decision on this issue was an unreasonable application of *Jackson*. This Court concludes that it was not.

MICH. COMP. LAWS §767.39 abolished the common law distinction between aiders and abettors and principles. It provides that aiders and abettors may be prosecuted and convicted as though they had directly participated in the crime. *See People v. Palmer*, 392 Mich. 370, 378, 220 N.W.2d 393, 396 (1974). Aiding and abetting under Michigan law requires proof of three elements: (1) commission of the underlying crime either by the defendant or some other person; (2) acts or encouragement by the defendant which aided or assisted the commission of the crime; and, (3) intent on the part of the defendant to commit the crime or knowledge by the defendant that the principle intended to commit the crime at the time aid or encouragement was given. *See People v. Acosta*, 153 Mich. App. 504, 511-12, 396 N.W.2d 463, 467 (1986) (per curiam). Petitioner's claim is that her actions during and after Helen Bazzetta's death do not amount to her being an alder and abettor, because evidence of both the second and third elements of this offense are lacking.

The evidence adduced at trial and summarized by the Court of Appeals was sufficient to allow the jury to find Petitioner guilty as an aider and abettor. As the Michigan Court of Appeals pointed out, "[a] detective who interviewed defendant testified that she stated that she and Joseph discussed

burying Helen's body before the murder." Moreover, the detective testified that Petitioner assisted Joseph in choosing the victim's burial site prior to the murder. Viewing the evidence in a light most favorable to the prosecution based on the detective's testimony, the jury clearly could have found that Petitioner encouraged Joseph to murder Helen, and knew that Joseph intended to murder Helen at the time of the encouragement. The last two pieces of evidence cited by the Michigan Court of Appeals [that the burial site was near the trailer park where Petitioner lived as a child, and that there was evidence that Petitioner attempted to fabricate an alibi for herself for the time of the murder] can therefore reasonably be interpreted as corroborating Hummel's testimony that Petitioner had encouraged Joseph to murder his step-mother. Viewed in this light, the Court of Appeals could conclude that this was sufficient evidence of aiding and abetting under Michigan law.

As the Michigan Supreme Court has explained, " [i]n order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, that he seek by his action to make it succeed.'" *People v. Cooper*, 326 Mich. 514, 521-22, 40 N.W.2d 708, 711 (1950) (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (internal quotation omitted); *see also, Palmer*, 392 Mich. at 378, 220 N.W.2d at 396-97. In other words, "the accused must take some conscious action designed to make the criminal venture succeed in order to be guilty of aiding and abetting." *Fuller v. Anderson*, 662 F.2d 420, 424 (6th Cir. 1981) (citing *Cooper, supra*).

The evidence in this case established that Petitioner did not like Helen Bazzetta. Joseph told Petitioner that he wanted to kill Helen Bazzetta and she helped him choose the burial site the night before the murder. Petitioner was present when Joseph strangled Helen Bazzetta to death. Petitioner helped clean up after the murder, helped bury Helen Bazzetta, and lived with him thereafter for five years until Helen's body was found. This Court concludes that Petitioner could be found guilty of second degree murder on an aiding and abetting theory, and that the Michigan Court of Appeals decision is a reasonable application of *Jackson v. Virginia, supra*. A rational trier of fact could have found the essential elements of aiding and abetting beyond a reasonable doubt. This Court also concludes that the determination of the Sixth Circuit in *Weaver v. Foltz*, supra, is distinguishable on its facts.

Accordingly, habeas claim two is denied.

D. Prosecutorial Misconduct

Petitioner's third habeas claim is that she was denied due process and her right to a fair trial by the prosecutor's improper conduct. Petitioner acknowledges that trial counsel did not object to the prosecutor's improper remarks; however, Petitioner stresses that the cumulative effect of the errors requires the Court to consider the merits of Petitioner's procedurally defaulted claims. The Michigan Court of Appeals relied on Michigan's contemporaneous objection rule which requires that an objection must be made at trial to preserve an issue for appellate review.

A petitioner is said to have procedurally defaulted his or her claims where there is an independent and adequate state procedural ground to bar habeas review. *Coleman v. Thomson*, 501 U.S. 722, 746-47 (1991). In this case, the Michigan Court of Appeal's reliance on Michigan's contemporaneous objection rule operates as such a procedural ground, and it can be presumed that the Michigan Supreme Court also relied on the procedural requirements of the court rule when denying Petitioner's application for leave to appeal. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803) (1991).

If a habeas petitioner is barred from presenting one or more of his or her claims to the state courts because of procedural default, petitioner has waived those claims for purposes of federal habeas corpus review unless the petitioner can demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional error. *Rust v. Zent*, 17 F.3d 155, 160 (1994).

To establish cause, a petitioner must present a substantial reason to excuse his procedural default. *Id.* at 161. Petitioner has made no such showing. Absent a showing of cause, this Court need not reach the question of prejudice. *Smith v. Murray*, 477 U.S. 527, 533 (1986). Furthermore, Petitioner has failed to set forth new evidence of actual innocence along with her constitutional arguments. *See Schlup v. Delo*, 513 U.S. 298 (1995). Therefore, this Court is not persuaded that a miscarriage of justice will result if the Court does not review Petitioner's procedurally defaulted claim of prosecutorial misconduct.

Habeas claim three is denied.

E. Venue

Petitioner's fourth habeas claim argues that the trial court improperly instructed the jury with regard to venue. While the Court notes that this claim is procedurally defaulted according to the opinion issued by the Michigan

Court of Appeals, this Court finds that it would be fruitless to engage in an analysis of cause and prejudice before reaching the merits of this claim. Petitioner's argument of improper venue is actually calling upon this Court to adjudicate a perceived error of state law. Habeas relief cannot be afforded on such a basis. *Estelle v. McGuire*, 502 U.S. 62 (1991); *Lewis v. Jeffers*, 497 U.S. 764 (1990).

Accordingly, habeas claim four is denied.

F. Sentencing

Petitioner's fifth claim in support of her application for a writ of habeas corpus argues that the trial court's sentencing reasons violated Petitioner's right to Due Process at sentencing and freedom of religion under the First Amendment of the federal constitution. With respect to this issue, the Michigan Court of Appeals stated as follows:

> We also reject defendant's argument that the court improperly considered defendant's religious beliefs in imposing sentence. Taken in context, it is apparent that the court was not condemning her religion. Further the judge specifically stated that he was not considering defendant's failure to accept responsibility for her actions as a reason for her sentence.

People v. Michelle Marie Grandis Bazzetta, Michigan Court of Appeals No. 123769 at p. 2-3) (September 8, 1994) (citations omitted).

Respondent correctly points out that under 28 U.S.C. § 2254 (e)(1) a state court's findings of fact are presumed correct. A petitioner has the burden of rebutting this presumption of correctness with clear and convincing evidence. *Id.* In the instant case, Petitioner argues at length that any religious references have "no place in a secular sentencing hearing." However, Petitioner has not even attempted to set forth any evidence, let alone clear and convincing evidence, that the state court's findings of fact on this issue are not entitled to the presumption of correctness. Because Petitioner has not satisfied her burden under 28.U.S.C. § 2254 (e)(1), habeas claim five is denied.

G. Petitioner's final habeas claim

Petitioner concludes her habeas arguments with the following claim:

> Even if no single error warrants reversal, 'the cumulative errors in criminal proceedings against petitioner cannot be held harmless and their cumulative effect clearly requires a new trial.

For the reasons stated in the Opinion and Order, the Court is not persuaded that there were cumulative errors in the criminal proceedings instituted against Petitioner that require a new trial. To the extent that this statement is an argument in support of her application for a writ of habeas n corpus, Petitioner's claim is denied.

IV. Conclusion

For the reasons set forth above, IT IS ORDERED that the petition for a writ of habeas corpus is DENIED.

/s/ Barbara K. Hackett
United States District Judge

Dated: July 9, 1998.

APPENDIX C

Civil Action No. 96-60314-AA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE GRANDIS BAZZETTA, Petitioner,

v.

JOAN YUKINS, Respondent.

Order Denying Motion for Reconsideration

Petitioner has filed a motion for reconsideration of the court's July 9, 1998, opinion and order denying habeas corpus petition. Local Rule 7.1 (h)(3) provides:

Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof. The court finds that the motion simply reiterates earlier arguments that have been previously considered. Petitioner has failed to raise a palpable defect by which the court has been misled or show that a different disposition must result. Therefore, petitioner's motion for reconsideration hereby is DENIED.

SO ORDERED.

/s/ Barbara K. Hackett
United States District Judge

Dated: July 30, 1998.

APPENDIX D

MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff - Appellee

v.

MICHELLE MARIE GRANDIS BAZZETTA,
Defendant - Appellant.

SC: 101564
COA: 123769
LC: 88-86394 - FC

Order

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motions to hold in abeyance and to extend page limit also are considered, and they are DENIED.

Levin, J., states as follows:

I would remand this case to the Court of Appeals for reconsideration in light of *People v. Christel*, 449 Mich. ___ (decided August 15, 1995).

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 25, 1995

/s/ Corbin R. Davis
Clerk

APPENDIX E

MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff - Appellee

v.

MICHELLE MARIE GRANDIS BAZZETTA,
Defendant - Appellant.

COA: 123769
LC: 88-86394 - FC

Before: MacKenzie, P.J., and Gribbs and M. E. Dodge,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and sentenced to life imprisonment. She appeals of right. We affirm.

Defendant was tried with her husband, Joseph Bazzetta. on a charge of open murder for the August 1, 1983 strangulation death of Joseph's stepmother, Helen Bazzetta. Helen Bazzetta had been missing for almost five years when her body was discovered in a wooded area adjoining an Oakland County trailer park, 45 miles from her Macomb County home. The prosecution tried defendant on the theory that she aided and abetted Joseph in murdering Helen. The defense was based on the theory that, although she had helped Joseph dispose of the body, she did not participate in Helen Bazzetta's death.

Defendant first contends that there was insufficient evidence to support her conviction. We disagree. There was evidence that both defendant and Joseph disliked Helen and that defendant was aware that Joseph wanted to kill his stepmother. A detective who interviewed defendant testified that she stated that she and Joseph discussed burying Helen's body before the murder. The burial site was near the trailer park where defendant lived as a child. There was also evidence that defendant attempted to fabricate an alibi for the time of the murder. The credibility of the witnesses and the weight of the evidence was

for the jury to determine. *See People v Wolfe*, 440 Mich. 508, 514; 489 N.W.2d 748 (1992). Viewed in light most favorable to the prosecution the jury could find from the evidence that Joseph's murder of Helen was premeditated and deliberate. Defendant knew that Joseph intended to kill Helen, and that she aided him in the commission of the crime. *People v. Schollaert*, 194 Mich. App. 139, 170; 496 N.W.2d 312 (1992); *People v. Buck*, 197 Mich. App. 404, 410; 496 N.W.2d 321 (1992), modified in part on other grounds sub nom; *People v. Holcomb*, 444 Mich. 853; 508 N.W.2d 502 (1993); *Wolfe*, *supra*.

Defendant next contends that she received ineffective assistance of counsel because her attorney failed to procure an to testify on battered spouse syndrome as part of the defense. The claim is without merit. "Syndrome" testimony relates to the actions of an abused person to an abuser. *People v. Beckley*, 434 Mich. 691, 710; 456 N.W.2d 391 (1990). While battered spouse syndrome might be a part of a claim of self-defense, s*ee People v Geraldine Wilson*, 194 Mich. App. 599; 487 N.W.2d 822 (1992), it has not been recognized in a case such as this, involving an abused spouse's conduct towards a third party. We therefore reject defendant's contention that she was deprived of a substantial defense. Further, the decision to proceed to trial without an expert was made jointly by defendant and defense counsel as a matter of trial strategy. We will not second-guess matters of strategy, and the fact that the strategy may not have worked does not constitute ineffective assistance of counsel. *People v. Barnett*, 163 Mich. App. 331, 338; 414 N.W.2d 378 (1987).

Defendant next claims that the trial court improperly instructed the jury on venue by leaving the jury no choice but so find venue in Oakland County rather than Macomb County. Defendant did not object to the court's instruction, precluding appellate review absent manifest injustice. *People v. Van Dorsten*, 441 Mich 540, 545; 494 N.W.2d 737 (1993). No such manifest injustice is present here. The attorney general designated Oakland County as the venue for prosecution. *See* MCL 762.3(2); MSA 28.845(2). and the jury instruction gave the jury a choice: either (1) find whether or not venue was in Oakland County, or (2) if that determination could not be made, then find that the attorney general designated Oakland County as the proper venue. We find no error requiring reversal.

Defendant contends that she was deprived of a fair trial due to several instances of prosecutorial misconduct. Defendant first argues that the prosecutor improperly referred to the deceased's remains as "Helen." This

argument is neither preserved nor does it have merit, especially in light of defense counsel's similar references. Defendant next argues that the prosecutor improperly asked her whether she thought prosecution witness Judy Martin was lying. While the questioning was improper, *see People v. Buckey*, 424 Mich 1, 17; 378 N.W.2d 432 (1985), the error was harmless because the substance of Martin's testimony was that defendant disliked Helen, which defendant admitted; it did not relate to the commission of the crime. Defendant additionally argues that the prosecutor improperly interjected an unsupported theory of guilt during his of cross-examination of defendant. This claim is also not preserved for review and does not reversal since the jury was instructed that the questions of counsel were not evidence, and the prosecutor did not mention the questions during closing argument. *People v. Philip Drake*, 142 Mich. App. 357, 361; 370 N.W.2d 355 (1985). Defendant's further claim, that the prosecutor improperly suggested that defendant feigned crying while testifying, similarly does not require reversal. Defense counsel effectively deflected the prosecutor's comments, negating any possible prejudice.

Defendant also claims that certain remarks made by the prosecutor during closing and rebuttal argument require reversal. Upon review, we conclude that the errors complained of were either unpreserved, and could have been cured through an appropriate jury instruction, or preserved but nor prejudicial. *See People v. Sharbnow*, 174 Mich. App. 94: 435 N.W.2d 772 (1989); *People v Marji*, 180 Mich. App. 525; 447 N.W.2d 835 (1989); *People v. Foster*, 175 Mich. App. 311, 317; 437 N.W.2d 395 1989).

Defendant's final claims concern her life sentence, which exceeded the guideline's recommendation of eight to 25 years as a minimum sentence. Given the circumstances of this offense and the offender, we are satisfied that the sentence is not disproportionate. *People v. Milbourn*, 435 Mich.630; 461 N.W.2d 1 (1990). Further, the court articulated sufficient reasons for exceeding the guidelines' recommended range. *People v. Flemming*, 428 Mich. 408; 410 N.W.2d 266 (1987). Defendant's argument that the sentencing court improperly considered the victim's impact statement of Helen Bazzetta's brother was not raised below and she has not demonstrated how she may have been prejudiced by the statements. We also reject defendant's argument that the court improperly considered defendant's religious beliefs in imposing sentence. Taken in context, it is apparent that the court was not condemning her religion. Further, the judge specifically stated that he was not considering defendant's failure to accept responsibility for her actions as a reason for her sentence. *See People v. Yennior*, 399 Mich. 892; 282 N.W.2d

920 (1977). Under these circumstances, resentencing is not required.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Roman S. Gribbs
/s/ Michael E. Dodge

APPENDIX F

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff,

v.

MICHELLE MARIE GRANDIS BAZZETTA, Defendant.

LC: 88-86394 - FC
Filed: November 30, 1992

OPINION AND ORDER

On August 27, 1991, the Court of Appeals remanded the above matter to this Court so that Defendant-Appellate may file a Motion for New Trial based on the Claim of Ineffective Assistance of Counsel. Proceedings on the remand are limited to the issues as raised in the Motion to Remand. This Court was instructed to hold an Evidentiary Hearing. After granting sufficient time for both parties to prepare and for additional matters to be heard by the Court of Appeals concerning the production of experts, this Court began said hearing on June 16, 1992, continued on June 18 & 19, 1992 and concluded on June 22, 1992. Following the hearing, both parties filed briefs, the last being received by the Court on July 22, 1992.

During the hearing, over objections of the prosecution, the Court allowed Defendant to fully develop the concept of the Battered Spouse Syndrome, hereafter referred to as "BSS". the court took testimony from a number of witnesses about the definition and characteristics of "BSS" as well as testimony that the Defendant suffered from this syndrome and that her acts were possibly the result of that syndrome. The Court did this in order to fully develop all testimony in connection with this matter.

On July 6, 1992, between the close of testimony and receipt of the final brief, the Court of Appeals issued its opinion in *People v. Geraldine Margaret Wilson*, 194 Mich. App. 599 (1992), giving guidance for trial application of this syndrome. Specifically, the Court of Appeals limited the testimony of the experts to their opinion on the syndrome and the symptoms

in which it manifests itself. The Court of Appeals did not allow testimony as to whether or not the individual defendant suffers from "BSS" or acted pursuant to it. Therefore, this Court in reviewing the testimony will follow the law as established in *People v. Wilson, supra.*

While a number of issues alleging ineffective assistance of counsel were argued in the motion for a new trial the only issue raised by Defendant in the evidentiary hearing was the deficiency of counsel in failing to present expert testimony on "BSS". It was argued that such testimony was necessary to justify Defendant's actions at the time and during the approximate five years after the murder and the discovery of the body. There was no question that the concept of "BSS" itself was presented and argued to the jury by defense counsel. The narrow issue here then is defense counsel's failure to produce an expert at trial to fully explain such symptoms to a jury.

A great deal of argument between counsel has centered around which standard of review this Court is to follow. This Court is satisfied that it is to follow the decision in *People v. Tommolino*, 187 Mich. App. 14 (1991). In that case, the Court of Appeals established the following standard,

> "To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that under an objective standard of reasonableness counsel made an error-so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. Moreover, the Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. Second, the deficiency must be prejudicial to the Defendant." (Page 17)

The Court does not feel it necessary to dwell on the history of how this standard ultimately has been adopted by the Court of Appeals. Suffice it to say the Court is satisfied as stated previously that this is the standard it must follow in this particular case. As a basis for its decision, the Court of Appeals in *Tommolino, supra*, relied on *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, supra, the Supreme Court established the following standard of review:

> * * * the proper standard for attorney performance is that of reasonable effective assistance. * * *. When a convicted defendant complains of the ineffectiveness of counsel's

assistance the defendant must show that counsel's representation fell below an objective standard of reasonableness.

* * * The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

466 U.S. at 681-688.

Additionally, the Court went on to state:

* * * In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, * * *, are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. * * *. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. **The purpose is simply to ensure that criminal defendants receive a fair trial.** (Citations omitted, emphasis added) 466 U.S. at 688-689.

Noting that a post-trial motion for ineffective assistance of counsel involves what is arguably "Monday morning quarterbacking", the Court went on to state:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's defense after it has proved unsuccessful, to

conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." * * *. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. (Citations omitted and emphasis supplied)

466 US at 689.

The Court further stated:

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then

> determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.(Emphasis added)
>
> 466 U.S. at 690.

A major issue in this case was counsel's alleged failure to obtain an expert and failure to adequately investigate. For guidance, *Strickland, supra*, states further:

> * * * strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and **strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.** In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.(Citation omitted, emphasis added)
>
> 466 U.S. at 690-691.

Utilizing the above guidelines this Court is convinced, having fully analyzed the evidence as developed at the hearing, that Defendant failed to meet her burden and that there was no ineffective assistance of counsel. The Court reviewed all testimony in light of the guidelines suggested in MCJI 13.06. It is obvious from the testimony and this Court's direct observation of the Defendant that she indeed has led a sad and tragic life. The traumatic events that have occurred to her throughout her lifetime are indeed an indictment of a segment of our society that abuses and degrades others.

Defendant has been described as acquiescent and seeking love, affection, and approval. A consequence of this personality and Defendant's life however, is that she has developed a chameleon like approach to her environment. Defendant, in fact, reflects her surroundings and circumstances and attempts to manipulate past history and facts to suit her purpose. This self-serving conduct is obvious and affects her credibility. The Court observed this manipulative behavior during the initial trial and felt that the Defendant's lack of credibility was the greatest weakness in her defense. As a result, Defendant failed to perform as as [sic] effectively as both she and her counsel, Mr. Kaluzny, anticipated she would. In the Court's opinion, Defendant's testimony during the trial did more harm than good and, based on testimony in the evidentiary hearing, this opinion is shared by both the Defendant and Mr. Kaluzny. This is unfortunate, but nevertheless still a factor in this case.

It is with this in mind that this Court cannot believe the testimony of the Defendant in relation to certain conversations with Mr. Kaluzny. The Court believes Mr. Kaluzny and does not believe the Defendant. The Court is satisfied that the decision to proceed to trial was one jointly made by Mr. Kaluzny and the Defendant. The Defendant was anxious to begin the trial and wanted no further delay. Also, the decision to proceed without the testimony of an expert was calculated and the decision was made based on the anticipated effectiveness of Defendant's testimony which in retrospect, was a tragic mistake. It was hoped that Defendant would sufficiently communicate to the jury the terror and fear in which she lived. This did not occur to the degree Defendant hoped. In addition, during the trial Mr. Kaluzny hammered upon the concept of the battered spouse.

During voir dire, Mr. Kaluzny excused a number of jurors who had difficulty with this concept and Defendant's failure to report the crime. Mr. Kaluzny argued it during his opening statement and again in closing. He presented all witnesses necessary to establish that Defendant in fact acted reasonably under the circumstances. While spouse abuse was a valid and common defense in 1989, it was not- common in this particular circumstance- nor is it common today. This situation does not fall within the general concept of a battered spouse defense. It is not the classic case of an individual person, having been abused by their spouse, suddenly striking out in either self defense or in an action perceived to be self defense and injuring or in fact killing their abuser. The suggested use of "BSS" in the circumstances of this case is a step forward (which in this Court's opinion should be made) to establish that such abuse can control the actions of people and is a factor to be considered by a trier of fact in rationalizing the action of that person. The absence of an expert

here however, given the state of law at the time of this trial, does not meet the criteria established in the controlling law to constitute ineffective assistance of counsel. It must be noted that the jury did deliberate and did determine that the Defendant was guilty of second degree murder rather than first degree murder as charged and that Joseph Bazzetta was convicted of first degree murder. Obviously, the defense presented at trial on Defendant's behalf was sufficient to obtain a major reduction.

Moreover, the Court does not feel that the testimony of the experts offered by Defendant in the evidentiary hearing, taken in a light most favorable to the Defendant would have sufficiently influenced the jury in this particular trial given the prosecutor's case and again, the testimony of the Defendant which failed to convincingly explain her actions, so as to change the ultimate verdict.

In this Court's opinion in all candor, an expert in the trial would have been nothing more than a redundancy. It is clear that the average person sitting on a jury could comprehend the concept of an individual living in fear and jeopardy and failing to report a crime. The failure to report was not the thrust of the prosecutor's case, however. The real issue was Defendant's participation in the murder itself, either as a participant, or at the least as an aider and abettor, who even suggested a burial site and ultimately assisted in the burial. It must also be considered that the prosecution would be entitled to produce an expert who might contradict Plaintiff's expert. It is conceivable, given the testimony that developed during trial, that blame for control prior to the murder could have been placed on Defendant and could have resulted in a first degree conviction for the Defendant. Simply put, this Court does not feel, having observed the entire trial and hearing the additional testimony, that the absence of an expert was a factor sufficient to constitute a violation of the Defendant's rights as set forth in *Strickland*, *supra*, as adopted in *Tommolino*, *supra*.

Therefore, the Court does not feel that Defendant has carried her burden of proving that her trial attorney failed to provide effective assistance of counsel. To the contrary, the Court feels that trial counsel did provide excellent and effective assistance to Defendant before, during, and after trial.

/s/Hon. Gene Schnelz P20038